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In The

SUPREME COURT OF THE UNITED STATES

(OCTOBER TERM, 1969)

THE ELDER-BEERMAN STORES CORP.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable The Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court which affirmed and granted enforcement of an order of the National Labor Relations Board. In this behalf Petitioner shows unto this Court:

OPINIONS BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit is as yet unreported but is attached hereto as Appendix A, *infra*, p. 26. The order and opinion of the National Labor Relations Board is reported at 173 NLRB No. 68 and is attached hereto as Ap-

pendix B, *infra*, p. 28. The trial examiner's decision is attached hereto as Appendix C, *infra*, p. 33.

JURISDICTION

The Court of Appeals' judgment ordering enforcement of the National Labor Relations Board order was entered on October 3, 1969. Petition for Rehearing filed by petitioner was denied by order of that Court entered on November 14, 1969, Appendix A, *infra*, p. 27.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), and Sections 10 (e) and 10 (f) of the National Labor Relations Act, 161 Stat. 142, 1947, 29 U.S.C., Chapter 7, Sections 160(e) and 160(f).

QUESTIONS PRESENTED

I. Whether the National Labor Relations Act and the due process clause of the Constitution permit the Board in an unfair labor practice case to refuse to require the General Counsel to identify prior to the trial the particular acts complained of or the employee or employees allegedly involved, thus making it impossible for the employer to prepare its defense adequately.

II. Whether in an unfair practice case where the complaint alleges employees were discharged solely for union activities in violation of Section 8(a)(3) of the National Labor Relations Act and the General Counsel tries and briefs the case on that basis, and where there has been not even a suggestion that the discharges were because of concerted activity unrelated to unionism and indeed the discharged employees themselves deny that their conduct was concerted activity, the Board has caused a variance

which deprived the employer of an opportunity to defend itself in violation of its right to a fair trial under the Constitution and the Act, if after the trial the Board then for the first time injects into the case the contention that the discharges were for concerted activity unrelated to unionism in violation of section 8 (a) (1) of the Act by its decision so holding.

III. Whether the Board has authority to circumvent the Taft-Hartley amendments to the National Labor Relations Act which excluded supervisors from the protection of the Act by ordering the reinstatement of a supervisor who the Company claims was discharged for joining employees engaged in misconduct during working hours and who the Board claims was discharged for failure to engage in surveillance.

IV. Whether a conversation between supervisors involving alleged surveillance instructions is privileged under section 8(c) and 8(a)(1) of the Act when the instructions are not executed and never revealed to any employee.

V. Whether Section 8(a)(1) of the National Labor Relations Act authorizes the Board to deny to an employer the right to discharge employees from engaging in a group slowdown, refusal to work and other misconduct, all during working hours on Company premises, by labeling such employee conduct protected concerted activity, even though no purpose for such conduct is communicated to management.

VI. Whether, when there is no evidence of any overt union activity on the part of an employee and no evidence of employer knowledge or opportunity of knowledge of any alleged union activity, and there is

evidence that such employee was discharged for misconduct during working hours, the Board is authorized to find that the discharge of such employee was for union activity in violation of Section 8 (a) (3) of the Act.

VII. Whether in spite of the guarantees of free speech in the First Amendment and Section 8(c) of the National Labor Relations Act a company official can be held to violate Section 8(a)(1) of that Act for telling employees during a representation election campaign that his "hands were tied now" because of NLRB rules forbidding raises during election campaigns, or that an existing company policy benefiting employees would be enforced.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and statutory provisions involved are the First and Fifth Amendments to the United States Constitution and Sections 2 (3), 7, 8 (a) (1), 8 (a) (3), 8 (c), 10 (b), 10 (c), and 14 (a) of the National Labor Relations Act (61 Stat. 142, 1947, 29 U.S.C. Chapter 7, Sections 151 et seq.). They are printed in Appendix D, *infra*, pp. 87-90.

STATEMENT OF THE CASE

Petitioner, The Elder-Beerman Stores Corp. (hereinafter referred to as "petitioner", "company" or "employer") operates nine retail stores in Dayton, Ohio. It had two warehouses, one at Helena Street and one five miles away at Apple Street where it employed about 50 persons, including 20 drivers and helpers engaged in delivering merchandise to the company's stores and to the homes of customers.

In late December 1966 and early January 1967, the company received a large number of customer complaints concerning its holiday and pre-holiday delivery service from the Apple Street Warehouse. (A. 224) Upon hearing these complaints, company president Beerman became concerned. He requested information concerning the personnel records of the delivery men to see the kind of men so employed, and the company instituted tighter disciplinary procedures. (A. 134-135, 210) The Warehouse superintendent warned the Apple Street delivery men about the complaints.

In early February 1967, Local 957 of the Teamsters Union (hereinafter referred to as the "Union") received signed cards from a number of the Apple Street delivery men and later filed a representation petition with the National Labor Relations Board to represent the 53 Apple Street employees. There never was any union activity at Helena Street and none was ever even claimed.

President Beerman spoke to the Apple Street employees on February 17, 1967. He assured them of their freedom of choice in selecting the union or not as collective bargaining representative as they pleased and that there would be no discrimination regardless of their choice. (A. 270) He stated his dismay over his recent discovery that some of the Apple Street rates were below the company's wage scale and contrary to previously announced policy, (A. 140) but that his "hands were tied now" because of NLRB rules forbidding raises during campaigns and that adjustments would have to wait until after the election. He also reaffirmed existing company policy that drivers should not be required to go out on deliveries after 5:00 P.M. (A. 271)

In late February 1967, following several additional requests from Beerman after his first one in January, company official Stine finally reviewed employee personnel

records with Beerman. (A. 134-37, 206-07) Beerman, for the first time, to his acute chagrin, ascertained that deliveryman John Rutledge had been employed while continuing to suffer a serious back ailment incurred while working for a previous employer which was preventing him from performing lifting tasks normally expected of drivers, that he had previously spent over a year in prison because of a burglary conviction, and that at one time there had been a fugitive warrant against him on an unspecified charge. (A. 207) To make matters even worse John Rutledge had been employed at Apple Street in spite of the fact that his brother Joe Rutledge was a long time employee at Helena Street, in violation of a long standing company rule against employing two members of the same family lest other employees believe discriminatory nepotism was involved. (A. 207) Beerman also found out that driver Colley had recently been convicted for carrying a concealed weapon and had been drinking on the job on several occasions (A. 137-38, 207-08), and that deliveryman Shepard was doing such a poor job that even his co-worker on his truck was complaining about him. (A. 208, 138-39)

Apprehensive on account of the excessive fear of housewives in the Dayton community because of (a) the increase in racial tension, (b) scarehead publicity of a strangler on the loose in nearby Cincinnati, and (c) aggravated crime, and fearful of the adverse publicity and customer alienation that would result if it were known that his company employed an ex-convict and a gun carrier as deliverymen "going into the homes of our customers" (A. 137), Beerman ordered that John Rutledge and Colley be discharged on February 25, 1967. Because of the complaints about Shepard, he also ordered him discharged at the same time.

After the card signing at the Apple Street warehouse

shortly before February 2, 1967, there was no further contact between union organizers and the employees. (A. 99) There was no visible union activity — no solicitation, meetings, or discussions among employees about the union. (A. 104, 112) There was no opportunity or occasion for the company to ascertain the identity of pro-union advocates. There was no anti-union campaign conducted by the company. Except for two speeches of president Beerman in which he assured the employees they could vote as they pleased without fear of the consequences, the matter of the union was never mentioned to Apple Street rank and file employees.

On April 13, 1967, the NLRB dismissed the representation petition because of the union's failure to produce a sufficient showing of interest among the 53 Apple Street warehouse employees.

On April 23, 1967, the company held its customary annual bonus party. The Apple Street employees all received substantial bonuses. Nevertheless some of the Apple Street drivers were apparently unhappy over the size of their bonuses and felt annoyed with the company.

On Tuesday, April 25, 1967, five delivery employees — Bledsoe, Cameron, Coleman, Pollard and Lockett, and delivery supervisor Graham as well, expressed their anger by staging a slow-down; refusing to do their work, preventing other non-participating employees from doing their own work, acting in a sullen, defiant, hostile and belligerent manner, shouting obscenities and ignoring demands of company officials to get on with their work. (A. 165-66, 182-83, 230, 201) However, they never communicated their complaints, whatever they may have been, to Company officials. Supervisor Graham was instructed to get the men to do their work. Instead Graham joined with the men. (A. 166) From the later testimony it

appeared that the employees involved were unhappy with the size of their bonuses received two days earlier, even though they were quite substantial, and planned to cause such a disruption that President Beerman would be forced to visit the warehouse (A. 142, 143, 144); but if this was the purpose of their conduct, it was never revealed to anyone in management. Neither the union nor unionism played any role whatever in the slowdown, nor did anyone claim that it did.

Company officer Stine regarded the slowdown and misconduct as a personal affront and thought the offensive conduct threatened the morale and discipline of the entire Apple Street work force. (A. 205) The five involved employees and supervisor Graham were all black. The company officials at the site were white. Because of racial tension in Dayton at the time, the belligerent and hostile attitude of the men involved, and "for the security and safety of the building and the people in it", (A. 195) Stine decided against immediate dismissal, but felt that individual dismissals after the group separated and returned individually was the safer procedure.

Because of the continuing fear of possible violence, Stine had an off-duty member of the Dayton Police Force come to the warehouse, and as a precaution stationed him outside the office during the termination interviews (A. 243), at which only one of the men protested his dismissal, and he did not even suggest unionism had anything to do with it or give any excuse for his conduct.

The company had 53 employees at the Apple Street warehouse, all of whom were in the "appropriate bargaining unit" requested by the Union when the Board earlier dismissed the Union's representation petition. Only the five employees and supervisor Graham involved in the slowdown were discharged. There were several other employees who were black men and others who had signed

union cards, who were not involved in the slowdown, and who were not disciplined.[1]

Unfair labor practice charges were filed against the company in February and May of 1967 by the discharged men. The Union, apparently satisfied that the discharges on both occasions were justified and not related to union activities, made no objection to the company or to the Board. The Board issued two complaints, one alleging that the discharges of Cooley and Rutledge in February and the other that the group discharges in April were dis-

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[1] It was not surprising that all the men discharged were black, because over the years Mr. Beerman had been a leader in the fight for equality for black people and had made it a policy to employ black citizens wherever possible. As a result, most of the deliverymen at Apple Street were black, as was Graham, their supervisor. Beerman had been a trustee and substantial benefactor of Central States College, an almost 100% black school. He had employed black men and women in responsible positions when he was considered "radical" for so doing, and long before even "show case negroes" began to appear in other companies. His efforts on behalf of the black people were recognized and appreciated by the black community, because, when a destructive riot occurred in the black west side of Dayton, the Elder-Beerman store in the Westown Shopping Center with all its glass show windows was just about the only store to remain untouched. When he recently gave a Thanksgiving Day Dinner Party for 3500 of the disadvantaged and/or lonely people of the Dayton area who would otherwise not have celebrated that holiday, almost half of the guests were black people. The discharged drivers complained to the Ohio Civil Rights Commission that their discharges were racially motivated, but on investigation that Commission found no basis for such a charge and dismissed the case. The foregoing facts are cited to show how unfair the prejudiced attitude of the Trial Examiner was, how unjustified the General Counsel was to charge racial discrimination in his brief to inspire prejudice against Petitioner before the Trial Examiner and the Board, and how incredible the testimony of Graham was when he claimed Beerman said "there were too many black boys down there, to get rid of them." (Not only would Beerman never have had such a thought, but even if one were to suppose he could be capable of harboring such an idea, he certainly would not be stupid enough to make such a statement in the presence of Graham, a negro. Yet the Trial Examiner gave full credit to such testimony from Graham.)

criminatory, in violation of Section 8(a)(3) of the Act. The two complaints were consolidated for hearing before Trial Examiner Benjamin B. Lipton.

The Complaints charged that Company official Stine had interrogated "employees" concerning union activities on numerous occasions, but did not identify the employees or specify the time or places of the alleged interrogations. The Company's motion to require the General Counsel to identify these alleged employees or specify the times or places of the alleged interrogations was overruled. During the trial when the General Counsel called Joe Rutledge (the brother of dischargee John Rutledge), to the stand as a Board witness, the Company learned for the first time that Joe Rutledge, who worked at Helena Street, was the "employee" in question and that the alleged interrogations were supposed to have taken place at Helena Street, five miles away from Apple Street, although Apple Street was the only location ever mentioned in the Complaint. Joe Rutledge testified that Stine asked him to find out about the union situation at Apple Street and report to him, but that he made no effort to carry out Stine's requests and there is no evidence that he ever told any employee about Stine's requests (A. 9, 10, 11, 12). Joe Rutledge's testimony was used as one of the chief bases for the Trial Examiner's and the Board's decision against the company. (A. 282, 285)

At the trial supervisor Graham turned out to be the other "employee," when he testified that company official Stine asked him to report on union activities and later chided him for not finding out any information, but that he, Graham, made no effort to carry out Stine's instructions, and there was no evidence that he ever revealed to any employee that he ever had received such instructions. Graham had been the supervisor of the drivers for several years. In recent months before April 25th

his work performance had deteriorated and he had been reprimanded. (A. 228) However, to encourage him to do better he had been given a large bonus ($520.00) just two days earlier. (A. 86) On April 25th, when he refused to assume control over his men but condoned and actually joined the slowdown, that was the last straw. For these reasons Graham was discharged.

The Trial Examiner and later the Board found all of the employees named in both Complaints were discharged for union activity. The Board repudiated a number of the Trial Examiner's findings with respect to the discharges but did not make new substitute findings of fact of its own as required by Section 10(c) of the Act, merely holding that there was sufficient evidence of "unlawful motivation" adduced by the General Counsel. All seven discharged employees were ordered reinstated with back pay.

The Complaints charged that the discharges of the employees were solely for union activity. The General Counsel tried and briefed the case on that basis. Nowhere was there any suggestion that the group discharge in April was for protected concerted activity which was not union activity. The group discharged in April all denied on the stand that their conduct embraced any concerted activity. (A. 55-56, 84, 106) Nevertheless the Trial Examiner, and later the Board, found that the activity of the employees on April 25th which was used as the basis for their discharge by the Company, even though unrelated to union activity, was protected "concerted activity", and that their discharge for such conduct even if not union activity violated Section 8(a)(1) of the Act. (A. 304) The Board found that supervisor Graham was discharged because he did not carry out Stine's alleged surveillance instructions and ordered his reinstatement with back pay.

Petitioner sought review of the Board's orders in the Court of Appeals for the Sixth Circuit. That court

affirmed and granted enforcement of the Board's orders without opinion, merely holding that "the findings and decisions of the Board are supported by substantial evidence on the record considered as a whole." That court denied petitioner's motion for a rehearing on November 14, 1969.

REASONS FOR GRANTING THE WRIT

The court below in affirming the Board without further opinion than "the findings and decision of the Board are supported by substantial evidence on the record considered as a whole" necessarily and erroneously decided the important federal questions set forth under "Questions Presented" supra. Those questions included vital constitutional questions of due process and free speech as well as questions of interpretation and administration of very important provisions of the National Labor Relations Act vital to proper but fair enforcement of those provisions. Conflicting opinions among the circuits and the necessity for an authoritative ruling by this Court on frequently recurring questions so crucial to proper interpretation and administration of the Act call for the Writ to be granted.

Question I.

The complaints alleged that petitioner's official Stine improperly interrogated "employees", without identifying them or the times and places of the alleged interrogations. Petitioner filed a motion for a bill of particulars for such information which the Board overruled. At the trial it was revealed for the first time that one of the "employees" (it turned out there were two) was not an employee at

Apple Street, the only place mentioned in the complaints, but was Joe Rutledge, who worked at Helena Street, five miles away, where there was no union or organizational activity of any kind. The other "employee" was in fact not an "employee" at all as defined in the Act, but was Graham, a supervisor.

The petitioner employs several thousand employees at nine stores, two warehouses and offices. The Apple Street warehouse was the only location mentioned in the complaints. The refusal to identify the alleged "employees" or the times and places of the alleged interrogations obviously left petitioner completely in the dark. It was taken by surprise at the hearing and was materially prejudiced.

An unfair labor practice case is almost a quasi-criminal proceeding. An employer found guilty can be subject to rather severe penalties in back pay awards, etc., and is branded a law-violator. The accused should be entitled to know with what he is charged with sufficient specificity to enable him to prepare his defense adequately. The case at bar is not only not unique, but it represents the almost universal practice of the Board of omitting specifics from unfair labor practice complaints. Nor does the Board permit pre-trial discovery as that term is generally understood.

Even private parties in civil cases are required to reveal all the specifics of their case to the other side. Surely the Government when acting through the Board and the General Counsel should be required to do no less. The practice of gamesmanship by the Government, of keeping the charged party in the dark so he can be taken by surprise at the trial without having had an adequate chance to prepare his defense, should be brought to a stop immediately.

This Court has said that "the requirements of due process" and a "fair hearing" are applicable to administrative agencies. *St. Joseph Stockyard Co.* v. *United States,* 298 U.S. 38, 51 (1936).

Courts of Appeals have reprimanded the Board for refusing to name individuals in complaints as in *Swift and Co.* v. *NLRB,* 106 F 2nd 87 (CA 10, 1939). Scholars have urged that pleading and discovery rules in administrative hearings be liberalized. See *F. Cooper, Should Administrative Hearing Procedures Be Less Fair Than Criminal Trials?* 53 A.B.A.J. 237 (1967).

The Board, however, in a particular case does not consider itself bound by courts of appeals' decisions in other cases, or by decisions even of this Court as to other government agencies, and certainly not by what authors may have to say. "Board Law" and "Board Practice" are sui generis. The Board practice complained of here is prevalent throughout the country, and is patently a violation of procedural due process. If the Board is to be forced to change, this Court will have to intervene.

Question II.

The complaint alleged the April 25th group discharge was solely for union activities in violation of Section 8 (a) (3) of the Act, and the General Counsel tried and briefed the case on that basis; but there was no evidence that the discharged men ever engaged in union activity or that the company thought so or had any reason to think so. Recognizing that the evidence to support the union activities charge on that aspect of the case was really too weak to survive, the Board ruled that in the alternative the April group discharge was for protected concerted activity, even though unrelated to unionism, in violation of Section 8 (a) (1), despite the fact that no such claim had ever been

made and indeed the discharged employees themselves denied being engaged in any concerted activities.

The alleged offense occurred on April 25, 1967. The trial did not begin until November 13, 1967, more than six months later, and the trial examiner's report containing the first charge of discharge for non-union concerted activity in violation of Section 8 (a) (1) was not issued until April 3, 1968, almost twelve months after the alleged offense.

Petitioner protested in vain to the court below that the Board could not validly find petitioner guilty of a different charge from the one that had been alleged in the complaint and on which the General Counsel had tried and briefed the case, because petitioner had had no notice of such a charge nor any opportunity to defend against it. Moreover the new charge made for the first time in the Trial Examiner's Report was made more than six months, the statutory limitations period, after the alleged offense. It is surely a very important question in labor law administration involving due process under the constitution and the Act whether a party can be charged and tried on one alleged violation and convicted on another of which no previous notice was given, whether one can be found guilty of a violation against which one has had no opportunity to defend, whether such a material variance deprived the petitioner of a fair hearing and due process. A question of such vital importance and fundamental principle deserves the attention of this Court.

Moreover, the decision below on this issue created a serious conflict in the circuits. The 4th Circuit in *Joanna Cotton Mills Co.* v. *NLRB,* 176 F 2d 749 (CA 4, 1949) held that a Section 8 (a) (3) union activities charge was so different from a Section 8 (a) (1) concerted activities charge that one could not be amended to the other after the six months limitations period. In the case at bar the new charge under Section 8 (a) (1) was added without

notice even without amendment and almost a full year after the alleged occurrence and after the case had been tried and briefed.

Also the 7th and 10th circuits have held that such a variance between the complaint and the Board's findings violates due process. *NLRB* v. *Bradley Washfountain Co.*, 192 F 2d 144 (CA 7, 1951); *NLRB* v. *United Nuclear Corp.*, 381 F 2d 972 (CA 10, 1967); *J. C. Penney Co.* v. *NLRB*, 384 F 2d 479 (CA 10, 1967). The Court below held otherwise.

Only this Court can resolve the conflict.

Question III.

The Taft-Hartley Amendments in 1947 excluded supervisors from the protection of the Act and defined "employees" so as to exclude supervisors. (Sections 2 (3), 10 (c), 14 (a)). The Board and court below sought to circumvent those amendments when they ordered reinstatement with back pay for supervisor Graham (who had been discharged for joining the employees in a slowdown and for refusing to attempt to get them back to work) by finding that he was discharged for failure to engage in surveillance (notwithstanding that there was no evidence to justify such a conclusion and indeed just two days before his discharge he had been paid a $520.00 bonus to encourage good work).

This case presents a very crucial question of the authority of the Board to order reinstatement of a supervisor. The court below has authorized the Board to overrule the Taft-Hartley exclusion of supervisors from the protection of the Act. Sections 2 (3) and 14 (a) exclude supervisors from the definition of, or recognition as "employees," and the authorization of Section 10 (c) to the Board to order rein-

statement extends only to "employees", thereby excluding supervisors.

There is confusion in the Circuits. The 4th and 9th circuits in *NLRB* v. *Inter City Adv. Co.,* 190 F 2d 420 (CA 4, 1951), and *NLRB* v. *Fullerton Publishing Co.,* 283 F 2d 545 (CA 9, 1960), held supervisors excluded from protection of the Act. In *Fullerton* the court said at p. 551:

> "a supervisor is not entitled to the protection afforded ordinary employees under the National Labor Relations Act, and as to such supervisors there can be no such thing as a discriminatory discharge or an unfair labor practice."

In *Texas Co.* v. *NLRB,* 198 F 2d 540 (CA 9, 1952) the 9th Circuit held that the Taft-Hartley Amendments were:

> ". . . intended to restore to employers the right and power to insist upon undivided loyalty of their supervisory personnel." 198 F 2d at 542.

and that Congress had in mind

> ". . . removing foremen and other supervisory personnel from the protection of the Act . . . ." id.

The 5th Circuit on the other hand has permitted the Board to order the reinstatement of supervisors discharged for refusal to carry out unfair labor practices, but made special findings in those cases *not present here,* that the discharges were coercive on non-supervisory employees and that such reinstatement was necessary to protect the rank and file. *NLRB* v. *Better Monkey Grip Co.,* 243 F 2d 836 (CA 5, 1957) and *NLRB* v. *Talladega Cotton Factory,* 213 F 2d 209 (CA 5, 1954).

To order reinstatement of a discharged supervisor not only extends the authority of the Board beyond its express

limits as specifically stated in the Taft-Hartley Amendments, but patently violates the rationale and raison d'etre of those provisions, which were to assure management of the undivided loyalty of supervisors. Even in the case of a breach of a specific employment contract of a supervisor, the most a court will award is damages, but will not order reinstatement. If management were required to reinstate a discharged supervisor, he would obviously be a one-man fifth column in not only labor relations, but as part of the management team his disloyalty could be ruinous in many ways. This would be intolerable. The National Labor Relations Act with the Taft-Hartley amendments could not have intended such a result.

The decision below adds to the confusion in the circuits. That confusion and the question, so vitally important to all industry, whether the Board has authority to order reinstatement of supervisors, desperately need clarification and definition by this Court.

Question IV.

The Board found that petitioner's official, Stine, interrogated Helena Street employee Joe Rutledge and supervisor Graham, to get information on union activity at Apple Street for him, but that neither carried out Stine's request, or gave him any information, and there was no evidence that either revealed to anyone Stine's interrogation or requests. There was no claim or evidence of any interrogation or threats to any employee at Apple Street. The Board found Stine's interrogation of Joe Rutledge and Graham violated section 8 (a) (1) of the Act. The Court below affirmed. In so doing its decision conflicted with decisions in the 2nd, 5th and 8th Circuits that isolated non-coercive interrogation is not forbidden by the Act. *Bourne Co.* v. *NLRB,* 332 F 2d 47 (CA 2, 1964); *Mel*

Croan Motors, Inc. v. *NLRB,* 395 F 2d 154 (CA 5, 1968); *NLRB* v. *Ralph Printing and Lithographing Co.,* 379 F 2d 687 (CA 8, 1967).

There is no authority for the novel proposition that an unsuccessful effort to get information from one not an employee of the unit being organized which is revealed to no one and therefore necessarily non-coercive, is a violation of the Act. Yet the Board and court below so held.

Graham was a supervisor. The Board and court below found Stine's remarks to him constituted an unfair practice regardless of whether employees had knowledge of them. The Board and court below scrapped the rule of *General Engineering, Inc.,* 131 NLRB 648 (1961), which held that unexecuted and unknown instructions to discriminate "do not have any impact upon the employees" and are therefore not coercive or violative of employee rights, 131 NLRB at 649. It is only when the instructions are obeyed or the conversations are made known to the employees that interference or coercion can possibly be inferred.

Until this case no court has ever adopted the idea that mere conversations between supervisors interfere with employee rights. The decision below on conversations between supervisors is in conflict with decisions of the 8th and 9th Circuits in *NLRB* v. *National Motor Bearing Co.,* 105 F 2d 652 (CA 9, 1939) and *Montgomery Ward* v. *NLRB,* 115 F 2d 700 (CA 8, 1940). Indeed it *sub silentio* overruled the earlier 6th Circuit decision in *Jervis Corp.* v. *NLRB,* 387 F 2d 107 (CA 6, 1967).

This conflict in the circuits should be resolved by this Court. In addition this Court should determine the important questions of whether it is permissible to extend Section 8 (a) (1) of the Act to limit the right of free speech in Section 8 (c) of the Act and the First Amendment

so as to prohibit unsuccessful non-coercive interrogation of persons not members of the unit involved or unrevealed conversations between supervisors.

Question V.

The five deliverymen discharged in April were engaged in a joint slowdown, exhibiting a hostile, belligerent attitude, and shouting loud obscenities. They did not communicate the reason for their conduct to anyone from management, even during their separate discharge interviews. It was not until their testimony at the trial that it was suggested that they wanted to create a disturbance that would be sufficient to bring Petitioner's president to Apple Street so they could complain to him about their bonuses (which in fact were quite generous) and possibly about their general dissatisfaction.

The court below affirmed the Board's holding that their conduct was concerted activity, even though not union connected, protected by Section 8 (a) (1) of the Act, and that their discharges were therefore unlawful.

It seems to be well settled that a slowdown, although necessarily a form of concerted activity is unprotected activity justifying discharge.

NLRB v. *Blades Mfg. Corp.*, 344 F 2d 998 (CA 8, 1965).

NLRB v. *Sunbeam Lighting Co., Inc.*, 318 F 2d 661 (CA 7, 1963).

NLRB v. *Montgomery Ward & Co.*, 157 F 2d 486 (CA 8, 1946).

The decision of the Board, affirmed below, attempts to make a distinction without a difference by calling the slowdown protected concerted activity because the Board found it was to express dissatisfaction even though its purpose was never communicated to management.

Thus the decision below creates direct conflict with the 4th Circuit in the very recent *Cone Mills Corp.* v. *NLRB,* 413 F 2d 445 (CA 4, 1969), when the court reversed the Board's finding a violation of Section 8 (a) (1) based on the discharge of eight employees who staged an in-plant work stoppage, even though the company was notified of the grievances and a union was involved. The decision below also conflicts with the 7th Circuit in *B & P Motor Express, Inc.* v. *NLRB,* 413 F 2d 1021 (CA 7, 1969), where the court said discharges of employees who walked out would be justified in the event the employer had no notice of the purpose of the walk out as "good faith company action in the face of an unexplained refusal to work."

The right of employers to discipline employees for engaging in an unexplained slowdown accompanied by a defiant, hostile attitude is surely very important to all business and employers as well. A decision by this Court is necessary to resolve the conflict in the circuits.

Question VI.

The five deliverymen fired on April 25th, as well as Colley who was discharged earlier, had no connection with union activity or unionism beyond the mere fact that they signed union cards in February. Admittedly the conduct of the five on April 25th had no connection with unionism or union activity. There had been no union activity at Apple Street since February. No union representative had ever visited Apple Street since then. There was no overt evidence of even any union interest, or that the petitioner had even any notion as to whom if any of the five April dischargees or Colley were sympathetic to the union. Indeed the Union representation petition had been dismissed sometime earlier because the Union could not even show enough interest in the Union among

the 53 employees in the bargaining unit to be entitled to an election. Nevertheless the Board found, and the court below held it was justified in so finding, that the five men as well as Colley, were discharged discriminatorily for union activity.

This Court has said that Board rulings must be based on substantial evidence in the record as a whole in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951), and that

> "Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established."
>
> *NLRB* v. *Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300 (1939).

Nevertheless the Board, affirmed by the court below, held that a discharge for union activity in violation of Section 8(a)(3) could be established with no direct or indirect proof of knowledge of the employer of any such activity by the discharged men, but the fact that the men discharged had signed union cards and that petitioner's president had made remarks which the Board interpreted as indicating hostility to the Union was enough for the Board and the court below.

Thus this case creates another conflict in the Circuits. In *Dubin Haskell Lining Corp.* v. *NLRB,* 375 F 2d 568 (CA 4, 1967), the Fourth Circuit held:

> ". . . proof of the company's knowledge of an employee's union activity is essential to the establishment of a discharge as discriminatory." 375 F 2d at 573.

In *NLRB* v. *Lexington Chair Co.,* 361 F 2d 283 (CA 4, 1966), the Fourth Circuit also said:

> ". . . the Board has the burden of proving this knowledge beyond mere suspicion or surmise."

In *NLRB* v. *Wagner Iron Works,* 220 F 2d 126 (CA 7, 1955), the Seventh Circuit held:

> ". . . discrimination may not be inferred from an employee's mere membership in a union." 220 F 2d at 133.

The Fifth Circuit held to the same effect in *NLRB* v. *Texas Industries, Inc.,* 387 F 2d 426 (CA 5, 1967).

The Eighth Circuit in *NLRB* v. *South Rambler Co.,* 324 F 2d 447 (CA 8, 1963) said:

> ". . . an employer's general hostility to unions without more does not supply an unlawful motive as to a specific discharge." 324 F 2d at 449-50.

The confusion in the circuits caused by the decision below permitting a discriminatory discharge in violation of Section 8(a)(3) to be found in the absence of any evidence (direct, indirect or circumstantial) of employer knowledge of union activity or membership of the discharged employees should be resolved by this Court. It is obvious that the proper answer to the question is of great importance to all in the labor-management field.

Question VII.

In his February 17th speech to the Apple Street drivers after the Union petitioned for an election, but before the Board ruled that the Union had not made a sufficient showing of interest and dismissed the Union's election petition, Petitioner's president stated that his "hands were tied now" because of NLRB rules forbidding raises during election campaigns and that consideration of adjustments would have to wait until after the election. Also in response to a complaint from the floor that some drivers, after putting in a full day, were being sent out on de-

liveries after 5:00 P.M., he stated that this was against company rules and would be stopped. At no time did he indicate in any way that the company's action would be dependent in the slightest degree upon how the employees voted. On the contrary, he assured the employees that they should make a free choice without fear or favor. Nevertheless, the court below affirmed the Board's holding that his statements were unlawful in violation of Section 8 (a) (1) of the Act.

The decision below in effect overruled the previous Board rule to the contrary in *Valley Feed & Supply Co.*, 135 NLRB 778 (1962), and is contrary to the decision of the 4th Circuit in *NLRB* v. *National Plastics Products Co.*, 175 F 2d 755 (CA 4, 1949), which found no violation in the company president's speech stating that the company "would have given the employees a raise in wages but for the fact that it could not do so under the law while an organizational campaign was in progress." 175 F 2d at 760.

This direct conflict in the circuits on this constantly recurring important phase of free speech in election campaigns should be determined by this Court. The guide lines in *NLRB* v. *Exchange Parts Company*, 375 U.S. 405 (1964) do not cover the situation involved in the case at bar. What can an employer say about possible benefits to employees during organizational or representation election campaigns? Must he remain completely silent and allow the union promises to convince the employees in the face of such silence that the only way to get any benefits is to vote for the union? This would obviously be very unfair. Can he not even explain his silence or lack of action as was attempted in the case at bar? Must he allow an existing company rule whose violation is causing discontent to continue to be violated? What rights of free speech

does he have under the First Amendment and Section 8 (c) of the Act?

This Court should resolve the conflict in the circuits and clarify the present uncertainty.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME GOLDMAN
Counsel for Petitioner

Of Counsel:

PAUL H. TOBIAS
GOLDMAN, COLE & PUTNICK

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 19,200

ELDER-BEERMAN STORES CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

(Filed October 3, 1969)

Before PHILLIPS, Chief Judge, and CELEBREZZE and PECK, Circuit Judges.

This case is before the Court upon the petition of Elder-Beerman Stores Corp. to review and set aside an order of the National Labor Relations Board, and upon the Board's cross-application to enforce the order. The decision and order of the Board are reported at 173 N.L.R.B. No. 68.

Upon consideration of briefs and oral arguments, the Court holds that the findings and decision of the Board are supported by substantial evidence on the record considered as a whole.

It is ORDERED that the enforcement be and hereby is granted.

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19,200

ELDER-BEERMAN STORES CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER DENYING PETITION FOR REHEARING

(Filed November 14, 1969)

Before PHILLIPS, Chief Judge, and CELEBREZZE and PECK, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
Washington, D. C.

Case No. 9-CA-4205-1
9-CA-4205-2
9-CA-4264

ELDER-BEERMAN STORES CORP.
and
REVOSIE L. COLLEY
JOHN HENRY RUTLEDGE
JAMES E. COLEMAN

DECISION AND ORDER

(Filed November 5, 1968)

On April 3, 1968, Trial Examiner Benjamin B. Lipton issued his Decision in the above-entitled proceeding,[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of the National Labor Relations Act, as amended, and recommending that the Respondent cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in other unfair labor practices alleged

[1] As corrected by the Errata dated April 5 and 12, 1968.

in the complaint. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the ruling of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.[2] The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.

1. We agree with the Trial Examiner that the Respondent violated Section 8 (a) (1) of the Act by coercively interrogating employees and requesting them to engage in surveillance and to act as informers regarding the union activities of other employees. We also agree that the Respondent violated Section 8 (a) (3) by discharging employees Rutledge and Colley, and violated Section 8 (a) (3) or alternatively 8 (a) (1) by discharging employees Coleman, Bledsoe, Pollard, Cameron, and Lockett. In this connection, we are satisfied that the General Counsel has

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[2] The Respondent excepts to the Trial Examiner's conduct of the hearing on the grounds that he allegedly interrupted and interfered with the Respondent's presentation of its case, asked leading questions of witnesses, and showed bias against the Respondent. Upon careful examination of the record, we are satisfied that the Trial Examiner was concerned only with his duty under Section 102.35 of the Board's Rules and Regulations "to inquire fully into the facts . . . to regulate the course of the hearing . . . to call, examine, and cross-examine witnesses. . . ." See *Brewton Fashions, Inc., A Division of Judy Bond*, 145 NLRB 99, 100. We find the exception without merit.

affirmatively established unlawful motivation by a preponderance of the credible evidence.[3] We, however, find it unnecessary to adopt the Trial Examiner's extraneous comment that the Act's protection extends to discussing plans to engage in a slowdown.

2. The Trial Examiner found and we agree that on February 17, 1967, about 2 weeks after the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union #957, requested recognition and filed a representation petition, the Respondent's President Beerman, in a speech, promised and granted benefits to employees in violation of Section 8 (a) (1) of the Act.

3. The Trial Examiner found, and the record shows, that the Respondent repeatedly instructed Supervisor Graham to engage in surveillance of employees' union activities, called him a poor supervisor, and discharged him for refusing to execute these instructions. Based on his inference that employees knew of the instructions and the reason for the discharge, the Trial Examiner found that the instructions, and the discharge for refusing to carry them out, constituted violations of Section 8 (a) (1) of the Act. We find, in the circumstances of this case, that this conduct was unlawful without regard to employee knowledge.

The nature and extent of the unfair labor practices committed by the Respondent clearly demonstrate that the instructions issued to Supervisor Graham were an integral part of a plan to discover the identity of employees

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[3] Consequently, we need not decide whether and if so to what extent *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, in the circumstances here present, places upon the Respondent a burden of proof as to motivation.

engaged in union activity and rid the Respondent of union adherents, and the discharge of Graham was designed to enforce such instructions and thus insure the success of the plan. In the light of all the circumstances, therefore, we find that the Respondent's instructions to Graham to engage in surveillance[4] and its discharge of Graham for refusing to carry out such instructions[5] interfered with the rights of employees guaranteed by Section 7, and were violative of Section 8 (a) (1) of the Act.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recomemnded Order of the Trial Examiner, and hereby orders that the Respondent, Elder-Beerman Stores Corp., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not specifically found herein.

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[4] See *Cannon Electric Company*, 151 NLRB 1465, 1468. We find it unnecessary in this case to determine the effect on employees' Section 7 rights of instructions to supervisors to engage in surveillance where employees are not aware of instructions and they are neither executed nor enforced by discharge. To the extent, however, that *General Engineering, Inc., etc.*, 131 NLRB 648, is inconsistent herewith, it is hereby overruled.

[5] See *Key West Coca Cola Bottling Company*, 140 NLRB 1359, 1361 enfd. in part 341 F.2d 524 (C.A. 5). Cf. *N.L.R.B.* v. *Talladega Cotton Factory, Inc.*, 213 F.2d 208 (C.A. 5); *Better Monkey Grip Company*, 115 NLRB 1120, enfd. 243 F.2d 836 (C.A. 5).

Dated, Washington, D.C., November 5, 1968.

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Frank W. McCulloch, Chairman

. . . . . .

John H. Fanning, Member

. . . . . .

Sam Zagoria, Member

NATIONAL LABOR
RELATIONS BOARD

(Seal)

APPENDIX C

TXD-207-68
Dayton, Ohio

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS

Washington, D. C.

Cases Nos. 9-CA-4205-1
9-CA-4205-2
9-CA-4264

ELDER-BEERMAN STORES CORP.
and
REVOSIE L. COLLEY
JOHN HENRY RUTLEDGE
JAMES E. COLEMAN

Barton P. Peck, Esq., and *Cassius B. Gravitt, Jr., Esq.*, for the General Counsel.

Goldman, Cole and Putnick, of Cincinnati, Ohio, by *Paul H. Tobias, Esq.*, for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

BENJAMIN B. LIPTON, Trial Examiner: Upon a consolidated complaint against the above-captioned Re-

spondent issued by the General Counsel of the Board,[1] a hearing was held in Dayton, Ohio, on November 13 and 14, 1967.[2] Alleged in the complaint are certain discriminatory discharges and additional acts of coercion in violation of Section 8(a) (1) and (3) of the Act. Respondent denies all alleged violations. At the hearing the parties were afforded full opportunity to present relevant evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. The General Counsel and Respondent submitted briefs, which have been duly considered.

Upon the entire record in the cases, and from my observation of the demeanor of the witnesses on the stand, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is engaged in the retail sale of merchandise at various stores in the vicinity of Dayton, Ohio. During the year preceding issuance of the initial complaint, it had a gross volume of business valued in excess of $500,000 and a direct inflow in interstate commerce of goods and products valued in excess of $50,000. Respondent admits and I find, that it is engaged in commerce within the meaning of the Act.

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[1] In Cases Nos. 9-CA-4205-1 and 4205-2, the charges were filed on February 27 and served on March 2; in Case No. 9-CA-4264, the charge was filed on May 1 and served on May 3. The complaints thereon were issued respectively on April 24 and July 28, and consolidated on the latter date.

[2] All dates, except as specified, are in 1967.

II. The Labor Organization Involved

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union #957, herein called the Union, is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

A. Supervisory Heirachy

The employees immediately involved consist of about 20 truck drivers and helpers employed in the loading area of Respondent's Apple Street warehouse. Under separate supervision of Charles E. Graham, 2 or 3 shuttle drivers transport merchandise to and from stores, and the rest make deliveries of packages, appliances, and home furnishings to the customers' homes. Also at Apple Street, in the main building, are various other personnel employed in warehousing operations and in work rooms where repair and custom jobs are performed for customers. Lloyd Nicodemus, warehouse manager, is in overall charge of the Apple Street employees. Scott Maxwell was assistant warehouse manager in charge of the workrooms.[3] Until he assumed the latter function early in 1967, he supervised the shuttle drivers. One other warehouse at Helena Street has no function in making deliveries to customers. Virgil Hank, superintendent of warehousing, supervises both warehouses comprising as many as 200 employees. Harry Stine, vice president of operations, has charge of all 10 retail stores and other facilities of Respondent. Max Gutman, executive vice president and general manager, and Supervisor Potts (duties are not otherwise defined), as well as all of the above-mentioned supervision, were pres-

[3] He left Respondent's employ in November 1967.

ent during certain events, as will be shown. Arthur Beerman is president and chief executive. He is also "the executive head" of several other enterprises. He testified that only about 10 percent of his work is devoted to Respondent.

B. Union Activity; Summary of Issues

About November 1966, John H. Rutledge visited the Union in quest of representation for the drivers and obtained blank authorization cards. Thereafter, he solicited several of the Apple Street employees to sign cards, but without substantial success. In January, he resumed his organizational efforts among the drivers, stressing the argument that they had to work a "ridiculous" amount of overtime without pay. He was able to obtain signed cards from "most of the fellows." However, an agent of the Union advised him that the cards were improperly signed. In early February, a meeting was arranged and held at the union hall where certain employees signed new cards and paid union dues in the amount of $17 each.[4] By telegram on February 3, as stipulated, the Union notified Respondent of claimed majority representation. On February 6, the Union filed a certification petition with the Board alleging an appropriate unit of about 20 employees, described as "all truckdrivers, helpers, and warehousemen" at the Apple Street warehouse. On February 17, President Arthur Beerman, accompanied by all management officials aforementioned, delivered a speech to about 20 assembled employees in the loading area at the Apple Street warehouse. Beerman's remarks, discussed *infra,* are in part

[4] The following drivers and helpers were specifically identified: Rutledge, Colley, Metcalf, Bledsoe, Coleman, Pollard, Cameron, and Lockett. Another driver, Woods, testified that he signed a card, but it is not clear that he was present on this occasion at the union hall.

alleged by General Counsel as constituting unlawful promises of benefit and direct bargaining with employees. Additional allegations consist of coercive interrogation of employees by supervisors, soliciting employees to report on union activities of other employees, requesting a supervisor to engage in surveillance of union activities, and issuing instructions to discharge employees sympathetic to the Union. On February 25, Respondent discharged Rutledge and Colley on grounds that a review of their personnel records ordered on February 17 disclosed that each was employed in violation of certain standing policies of Respondent. On April 6, at a formal Board hearing in the representation proceeding, the parties stipulated that the appropriate unit comprised "all warehouse employees, including truckdrivers and helpers," and it appeared from a list submitted by Respondent that approximately 53 unit employees were employed as of the payroll period ending February 5. In mid-April, President Beerman made a further speech at the Apple Street warehouse, on this occasion to all warehouse personnel, including the office help. He asked the employees to "give Elder-Beerman another chance" before they "vote for this union." By order dated April 13, the representation petition was administratively dismissed by the Regional Director for failure of the Union to produce a sufficient showing of interest among the employees in the appropriate unit. On April 25 and 26, Respondent discharged Coleman, Bledsoe, Cameron, Pollard, Lockett and Supervisor Graham allegedly for the reason that they engaged in a "slowdown" on April 25. All these discharges are alleged as unlawful.[5]

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[5] At the conclusion of General Counsel's case in chief, in the absence of any supporting evidence, the motion was granted to dismiss the allegation in the complaint that Respondent awarded bonuses to prounion employees of lesser amounts than it awarded to other employees.

C. Restraint and Coercion

1. Vice President Stine

Joseph Rutledge worked for about 8 years at the Helena Street warehouse. In September 1966, upon his referral, his brother, John H. Rutledge, was employed at the Apple Street warehouse, notwithstanding known practices of Respondent against hiring relatives of present employees or employing persons having a police record. In early February, Joseph Rutledge was called into Stine's office, with Vice President Gutman present. He was asked by Stine whether the employees (at Helena Street) had any problems, and he replied, "none." He was told that Respondent had received a telegram from the Union that morning seeking recognition on behalf of the Apple Street employees and was asked if he knew anything about it. He answered, "no." He was then asked if he would accept an assignment to work at Apple Street for the purpose of obtaining information for Respondent concerning union activities of employees. He said it was not a good idea because "the fellows" would know why he was there. Then he was asked if his brother, John, was "in on it" and would John tell him anything. He said he did not know and did not think his brother would inform him on "anything that might be going on down there." Finally he was requested to keep Stine informed of he "heard anything about the situation."

A "couple of weeks later," Joseph Rutledge was again summoned by Stine and was given a merit raise. Stine asked him if he heard anything concerning the Union and, receiving a negative response, remarked, "You are a poor detective."[6]

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[6] Based on credited testimony of Joseph Rutledge. In effect, Stine admitted the interrogation, but denied generally that Rutledge "ever spied" for him.

Charles E. Graham testified that for 2 years he had been supervisor of the drivers and helpers at Apple Street.[7] Stine advised Graham of Respondent's receipt of the Union's telegram and told him to keep his eyes and ears open. Thereafter, Stine spoke to Graham virtually every day until mid-April seeking reports on the union activities of the employees. Although he agreed to do so, Graham did not give Stine the names of any employees.[8] Because of his failure to cooperate in this fashion, he was called a "poor supervisor" by Stine and Hank on several occasions. Graham described these requests, *viz:*

> See if I could find a list of names. He wanted me to fraternize with them because he heard they hung out at a bar and to get in on their conversations, because being a Negro I could get in with these guys because the majority of them were Negroes and I could be an inside man for him.

It is evident that Vice President Stine approached Joseph Rutledge in the manner related above particularly because of this employee's relation to John H. Rutledge. In the context, I find that Stine acted unlawfully in interrogating Joseph Rutledge as to his existing knowledge of the union movement and in seeking to enlist him as an informer to obtain information concerning the union sentiments of employees at Apple Street. It is immaterial that Joseph Rutledge was not himself in the appropriate unit or employed at the Apple Street location. The essential test is whether the conduct in question reasonably tends to restrain or coerce employees in the exercise

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[7] During the hearing, Respondent stipulated that Graham was a supervisor.

[8] Stine denied that he asked Graham for a list of union adherents. Graham is credited.

of their Section 7 rights.[9] I so conclude, and hold that these alleged violations of Section 8 (a) (1) are sustained.[10]

There is ample showing that Supervisor Graham was given repeated instructions by Vice President Stine during the union campaign to engage in surveillance of employees at Apple Street for the purpose of garnering a list of names or reporting on the identity of union adherents. He did not comply with these instructions. Elsewhere it is made clear that he was sympathetic to the representation desires of the employees. Upon all the evidence, as further shown *infra,* a reasonable inference may be drawn that at some time before his discharge Graham divulged to some employees the substance of these instructions "which so vitally effect their interests." The Board has held that —

> . . . Respondent's instructions to its supervisors encroached upon protected activities, "for a disclosure to employees that management has set in motion a chain of events to ascertain and identify union adherents can clearly restrain their freedom in expressing their sentiments regarding organization." [Citing *Daniel Construction Co.* v. *N.L.R.B.,* 341 F. 2d 805 (C.A. 4) .][11]

Accordingly, I find in these circumstances a violation of Section 8 (a) (1).

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[9] *Joy Silk Mills, Inc.* v. *N.L.R.B.,* 185 F. 2d 732 (C.A.D.C.), cert. denied 341 U.S. 914; *Struksnes Corporation,* 165 NLRB No. 102.

[10] E.g., *Sarkes Tarzian, Inc.* v. *N.L.R.B.,* 374 F. 2d 734, 736 (C.A. 7).

[11] *Cannon Electric Company,* 151 NLRB 1465, 1468.

2. Events of February 17

President Beerman's Speech

As earlier noted, on this date Beerman made an appearance at Apple Street, together with a full supervisory retinue, to address an assembled group consisting essentially of the drivers and helpers. His remarks in detail were described by several employee witnesses for the General Counsel,[12] in pertinent part as follows: The Company had received a telegram from a union that these employees wanted to be represented. He understood that 14 or 15 fellows paid a union $17 of their hard-earned money. If they could spend $17 foolishly to try to get a union in, he could spend $17,000 to keep it out, if he wanted to. He is a fair-minded man, and if they have any grievances, he has 3 telephones, is available, and can be reached at any time. It was entirely up to the employees if they wanted a union, and no one would be in jeopardy because of his feelings about a union. They do not need an outside representative. If they came straight to him instead of going to the union, he would have made things better for them. He stated, "I know that there are discrepancies in the pay rate here, and this will all be taken care of . . . . Of course, my hands are tied right now unless you want to write —."[13] He then proceeded to talk about benefits presently enjoyed, e.g., the insurance plan, the "baby bonus," and the retirement plan. He mentioned yearly bonuses of $550 or more for drivers with over 2 years of service, and gift certificates for those having 1 to 2 years' service. He commented that the men "look

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[12] Principally by John H. Rutledge and Coleman, corroborated in material parts by Colley, Lockett, and Supervisor Graham.

[13] Beerman left this statement unfinished.

like a bunch of thugs rather than delivery truck drivers." Their uniforms were the wrong color, the wrong kind, and "not in order for going to someone's house." He wanted each driver and helper to have a new uniform immediately. "But the discrepancies in pay can't be taken care of until this business is cleared up. . . . An election is coming up, and I can't do anything about your raises until this is over with." Beerman also gave assurances that he did not discriminate "against the colored man," pointing out that Graham is a supervisor and that he had assistant managers at the store who are colored. He invited questions from the employees.

Bledsoe said the biggest complaint among the employees was the overtime.[14] They came in at 8 a.m., at times did not return from deliveries until 5 or 6 p.m., were again sent out on "specials," and "many times" were not through with their work until after 8 p.m. Beerman directly responded: "This will cease . . . the next time anybody asks you to take anything out after 5 o'clock, tell them to go to hell and call me." Rutledge also spoke up, describing as unfair the transfer of a driver to a different route and causing the employee to quit. Beerman then stated that — "nobody tells him how to run his company, he runs it like he sees fit."

Stine and Beerman were examined by Respondent, briefly, as to the content of the speech.[15] Stine testified that he could not recall anything like the statement that $17,000 would be spent to defeat the Union, and made a

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[14] As shown in the record, they were paid entirely on the basis of a daily rate, without regard to the number of hours worked.

[15] Supervisor Hank, upon a simple query, denied that Beerman in his speeches ever promised the employees benefits "if there was no union." Other employees and supervisors called by Respondent were not questioned on this subject.

general denial that there were promises of benefit. Beerman testified he told the employees that the personnel department was not adhering to the minimum starting wage, that "adjustments and increases were not properly taken care of," and that "its being done now" — (explaining that by "now" he meant since his "discovery"). That morning he ordered uniforms for all drivers. He assured them that they will not have to go out again after 5 p.m., but he promised them nothing "at the time," other than — "I would take a greater interest in their area than I have probably heretofore, or something like that."

To the extent that conflict exists, I accept the detailed and substantially corroborated account given by the employees, set forth hereinabove, as against the vague versions of Stine and Beerman.

Other Conduct of Beerman

Graham testified that, on February 17, before Beerman's speech to the employees, the following colloquy took place, in the presence of Stine, Hank, and Maxwell:

> Beerman: What are these black boys trying to do to me, bring in Black Power?
> Graham: I don't know, Mr. Beerman. What do you mean?
> Beerman: About this Union, most of them are black.[16]
> Graham: I don't know anything about it.
> Beerman: You should. You are black too.

Graham answered that they look at him "the same way they do [Beerman] . . . . A businessman."

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[16] At a later point, Graham paraphrased his testimony, i.e., that Beerman said "that since the majority of the employees were Negroes in this union, that they were trying to bring in Black Power on him."

After the speech, Graham overheard Beerman tell Stine and Hank that — "there were too many black boys down there, to get rid of them." Graham was about 8 feet away and no employees were within earshot.[17]

Supervisor Graham

Also following Beerman's speech, Graham spoke to John H. Rutledge in privacy. According to Rutledge, Graham inquired, "John, are you leading these fellows?" He replied, "Yes." Graham continued, "If you are leading them, and they want their jobs, tell them not to pay any attention to what Beerman said about not taking things out after 5 o'clock. . . . Those people buying things need them, and so use common sense . . . tell those fellows to not do that until after they get the union in."[18] Rutledge commented that the Union was good for the employees and would make Graham's job easier, — to which Graham expressed agreement.

Conclusions

While this question is close, I do not find as an unlawful interrogation Graham's inquiry of Rutledge as to whether he was leading the employees. Graham's purpose, clearly understood by Rutledge, was to protect the employees against possible discipline for insubordination and

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[17] Beerman nor Maxwell were questioned as to the foregoing. Stine stated a denial to the question whether Beerman ever said to him, in the presence of others, that he should get rid of union employees. Similarly, Hank testified he never heard Beerman instruct Stine to fire employees who were sympathetic to the Union. In all the circumstances, I am constrained to credit Graham.

[18] Graham's testimony, on his cross-examination, was not materially at variance.

was not directed primarily to the subject of the Union. In my opinion, Graham's conduct here, essentially sympathetic, would not reasonably tend to coerce Rutledge or the employees generally concerning their union activities.[19]

Respecting Beerman's conversations with Graham and those overheard by Graham, in these instances the alleged violations must be dismissed in the absence of any showing or reasonable inference that such statements of management came to the attention of employees. However, the same evidence is generally relevant insofar as it reveals the motive of Respondent with respect to the discriminatory issues, treated *infra*.

As to Beerman's speech, despite the token phrases of neutrality, the whole setting and tenor of the talk portrayed impressive antagonism by Respondent to the organizing drive of this small group of employees. President Beerman had theretofore been rarely seen at the Apple Street warehouse, more especially among the drivers and helpers in the loading area. This appearance, together with an array of supervisory subordinates, including two vice presidents, could only signify to the employees a sense of deep concern and alarm of top management, for the sole and obvious reason that the Union had made a representative claim on behalf of these employees. General Counsel's evidence as to the factual content of the speech was substantially uncontroverted. Accordingly, I find Section 8 (a) (1) violations, summarized as follows:

With the real question concerning representation raised by the Union's telegraphic demand, it is clear that Beerman sought to undercut the Union by bargaining directly with the employees. Thus, he recognized specific griev-

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[19] See *Cannon Electric Company*, 151 NLRB 1465, 1470.

ances of the employees as to discrepancies in their rates of pay and uncompensated overtime work. He admonished them for going to an outside representative and not coming straight to him. Referring to his three telephones and his availability at any time, he suggested that they bring their grievances directly to him, impliedly for immediate adjustment.

By reasonable implication at the least, these drivers and helpers were led to believe that they were being promised present and prospective benefits to influence their defection from the Union. Beerman's statements were explicit that corrections in the pay rate "will all be taken care of" and that "adjustments and increases" were being handled "now," since his discovery of these inequities. Side remarks were vaguely interspersed by Beerman, for example, that because of the election "coming up" and until "this business is cleared up," he could not do anything about their raises at present. In the context described, it cannot be regarded that the promises were effectively neutralized or that the employees could reasonably understand from all the remarks that these were not promises being made to discourage their desires for union representation, the dominant issue at hand. Even upon the assumption that in totality the statements were clear that benefits could not be granted until after the representation question was resolved, Beerman's remarks were nonetheless coercive in that the employees were plainly being dissuaded from favoring the Union by promises of subsequent adjustments and increases to satisfy their present grievances.[20] Similarly, Beerman's order to halt the overtime after 5

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[20] E.g., *Eugene Yokell and Bernard Yokell, Copartners, d/b/a Crescent Art Linen Co., etc.*, 158 NLRB 447, enfd. in pertinent part, 66 LRRM 2755 (C.A. 2).

p.m., whether or not carried out, constituted an unlawful inducement directed toward a major cause of complaint which Respondent believed had prompted the employees to seek out the Union.[21]

D. The Discharges

1. Rutledge

As previously noted, John H. Rutledge was hired in September 1966 as a driver at the Apple Street warehouse upon the recommendation of his brother, Joseph, an employee at the Helena Street warehouse. The hiring interview was conducted by Virgil Hank, superintendent of warehousing. Hank specifically questioned John and was fully informed concerning entries on his application showing a police record and a disability resulting from a back injury.[22] He told Hank that the amount of lifting he could do was "very limited" and that he could drive a truck if it was not too heavy. Hank finally told John he would speak to Vice President Stine and let him know. Thereafter, his brother Joseph was advised by Stine and Hank that, on the basis of Joseph's good standing with the Company, John was being hired and would be retained as long as "he kept his nose clean." Thereupon bondage papers were made out for John's employment.

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[21] I make no finding that the issuance of new uniforms constituted a benefit or substantial change in a condition of employment.

[22] In July 1954, he was convicted of burglary, placed on probation for 5 years, and released after 13 months for good behavior. In the 3 prior years, he had 4 different operations performed on his back and received workmen's compensation during this period.

At Apple Street, Rutledge worked for 2 or 3 weeks as a shuttle driver. He was then offered and he accepted a package route on which he remained until his termination. On one occasion, before Christmas, a dispute arose with Graham because other drivers complained that Rutledge was not being given the heavier lifting work. However, the difficulty was resolved after a meeting was arranged at which Rutledge explained to the men the circumstances of his back deficiency. At various times, his work was highly commended by different supervisors.

It has been shown that John H. Rutldege was in fact the leader among the employees in the union campaign, and that Stine sought to establish a system of surveillance, including a request of Joseph to obtain from John information concerning union activity at Apple Street. At Beerman's speech of February 17, Rutledge was one of the spokesmen. As Graham credibly testified, after the speech Stine told him Rutledge "seemed to be the smartest one of them and he had him figured out to be the leader." Graham said he did not know. Graham also spoke to Rutledge after the speech, inquired if he was "leading these fellows," and received an affirmative reply. In sum, I find that Respondent was aware of the leadership activities of Rutledge prior to his discharge.

On February 25 (a week after the speech) John H. Rutledge was discharged by Stine, in the presence of Supervisors Nicodemus and Maxwell at the Apple Street warehouse. Stine said, "John, we have been doing a little review of your application, and due to your police record and back condition the company can no longer keep you under their employment." Rutledge protested that the Company knew about these things when he was hired.

Stine said that there were certain things Rutledge did not state about his police record.[23]

Respondent's defense, based essentially upon the testimony of conversations between high management officials, consists in substance as follows: In latter December or early January, President Beerman (according to his testimony) received numerous complaints from customers concerning damaged merchandise, returns, and poor service. These were particularly heavy around Christmas time, the busiest part of the selling season. He spoke to Stine several times on the phone about the complaints, — as it was Stine's job to be responsible for all services and personnel. On these occasions, he asked Stine to let him see the employment records of all Apple Street employees whose functions related to delivery and service.[24] Because of "a lack of things in a company that's busy," — these records did not come to his office "for some time thereafter," (i.e., until late February). In January and February, his attention was brought to the number of pickups or returns "in the home furnishings area." On February 17, he held the meeting at the Apple Street warehouse for the purpose of finding out what the "problems had been," and he did learn that "there were some in-

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[23] Later that day, Rutledge discussed his discharge with a union agent, Sexton, at the union hall. He testified that Sexton informed him that Respondent had mentioned a "fugitive warrant" against Rutledge which did not appear on his application. In his affidavit given to a Board agent, Rutledge stated: ". . . Stine told me that the company could no longer go along with my back condition and the fugitive thing . . . the only thing I can recall is that I was arrested for speeding in Germantown, Ohio, in 1951, and was released to return four days later to pay my fine. I didn't appear and the police picked me up two days later and I was taken back to Germantown to pay my fine."

[24] Stine described this as a "passing request" by Beerman.

equities." Following his speech, he "demanded" of Stine the applications of these drivers as well as "their reference checks," which were subsequently furnished. As to Rutledge, *inter alia,* he discovered that this employee had a brother working for the Company in violation of a definite rule, that he had a back problem which "made him ineligible" for driving a truck, and that he had a police record. He thereupon ordered the discharge.

Respondent's assigned grounds for Rutledge's discharge appear to me to be transparently disingenuous and artificial. Much of the defensive evidence consists of vague and generalized conclusions of Beerman and Stine, of a self-serving character. For example, no attempt was made by probative means to show that the volume and type of customer complaints were unusual during this Christmas season. Nor is it plausible that the intercession of a company president of a large corporation and his requests for employment records of personnel would remain unheeded over a period of some 2 months. Indeed, such a problem was dealt with shortly after Christmas when Superintendent Hank spoke to all warehouse employees at Apple Street.[25] He said that each complaint would be investigated and where there was a clear-cut showing of negligence, the responsible employee would be given a day off without pay as a reprimand. As a result, only one employee (Chambers) was given a day off in early January. On February 17, Beerman "became quite vehement" about checking the records of employees. The ordered search, so far as evident, was confined to the drivers and helpers at Apple Street (i.e., those employees assembled

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[25] It would appear from the testimony that Hank's speech was not limited to the drivers and helpers, but rather was made to the entire Apple Street staff, including warehouse and work shop employees.

for the Beerman speech that day). In addition, special investigative requests were made of the "credit bureau and other sources"[26] for information concerning these employees.

> Q. (By Trial Examiner) But the policy regarding criminal records, that was company-wide?
>
> A. (Stine) Yes, sir.
>
> Q. And the policy concerning nepotism or the relative rule, that was company-wide?
>
> A. With some exceptions, where there has been a company purchased or something to that effect.
>
> Q. Yes, as already clarified.[27]
>
> A. Yes.
>
> Q. Do you know whether during all your tenure with the company, whether any similar review was made of any store or division of the company, or such an intensive review or complete review of records, and also engaging the credit bureau and other sources?
>
> A. Well, the credit bureau and other sources are used on a day-to-day basis also.
>
> Q. Yes, but there was an additional request at that time. This information, the further information that you got, for example the fugitive warrant, you got a result of a specific request?
>
> A. Yes. No, to answer your question, I do not know of another situation exactly like this one.
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> * * *[28]

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[26] It was revealed, for example, that Respondent retained on a part-time basis officers regularly employed on the Dayton police force, *infra*.

[27] Elsewhere Stine testified that Respondent kept in its employ "quite a few people," acquired with the purchase of a company, who had relatives among its existing employees. As to another stated policy, it was not shown that employees thus acquired who had police records were terminated.

[28] Earlier testimony.

Q. (By General Counsel) What reason did you give John H. Rutledge for discharging him?

A. (Stine) I told Mr. Rutledge that there had been a review by other officers of the company on his application, on his back injury, which we didn't realize the full seriousness then, and that for the police record, which included a fugitive charge, which we had just become aware of, and which he didn't have on his application.

Q. Now this fugitive matter you are talking about, that's something that happened back seven or eight years or longer ago?

A. I believe that's correct.

Q. And it was just coming to your attention in February of 1967, is that correct?

A. That's correct.

Q. And that's why you fired him?

A. That's why he was terminated; yes, sir.[29]

Substantial evidence has been described herein of the events in the union campaign among these employees, as well as Respondent's animus and unlawful reactions thereto. From the proffered testimony of top management, it would seem that these occurrences relating to the Union were nonexistent.[30] In clear fact, it was solely by reason of the Union's claim in February that President Beerman personally involved himself in depth with these drivers and

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[29] Stine did not attempt to describe the nature of the fugitive charge or to contradict Rutledge that it stemmed from a traffic violation which was cleared by his payment of a fine.

[30] The observation is also noted that to an extraordinary degree Respondent's brief has in lengthy detail misstated the evidence, for example, in repeatedly citing as evidence testimony explicitly stricken from the record, and otherwise in specifying evidence which patently does not exist. Similar difficulty was encountered at the hearing at which counsel was frequently cautioned to control witnesses who were inclined to state their conclusions and mental processes in response to questions requiring specific facts.

helpers. On February 17, he came to Apple Street to make a speech and engage in other conduct designed to eradicate the union threat in the manner previously shown. And immediately thereafter, Respondent undertook an intensive and unprecedented investigation of these employees with the objective of finding grounds for employee terminations. The latter action supports Supervisor Graham's testimony in effect that Beerman gave instruction to "get rid of" some of these employees. Respondent thus set in motion a discriminatory process for the consequences of which it must be deemed responsible, whether or not it actually knew the union sentiments of the employee being discharged as a result of the investigation.[31] But Rutledge's union leadership was indeed known to Respondent, which rendered this employee especially vulnerable. As to him, the factors of the relative rule, the police record, and the back ailment were fully revealed at hiring and long accepted by all active supervision. The dredging up in the investigation of a so-called fugitive charge serves only to show the insubstantiality of Respondent's defense in its seizure upon this ancient and relatively minor infraction. Finally, the point is developed by intermanagement conversation that the decisions of highly placed subordinates favoring the employment of Rutledge were superseded or revoked by President Beerman, and that this operated to imbue the discharge action with legitimacy. The proposition, factually and legally, is without merit.[32]

Upon all of the foregoing, I find that Rutledge was

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[31] E.g., *Signal Oil and Gas Company*, 130 NLRB 644, enfd. 67 LRRM 2708 (C.A. 9).

[32] See e.g., *N.L.R.B. v. Neuhoff Bros. Packers, Inc.*, 375 F. 2d 372, 376, on the applicable doctrine of respondeat superior.

discharged for discriminatory reasons, in violation of Section 8 (a) (3).

2. Colley

The discharge of Colley, an Apple Street shuttle driver, was similarly effected on February 25 purportedly on orders from Beerman based upon the personnel data supplied to him pursuant to the investigation, *supra.* In March 1966, he was referred to Respondent by an employment agency and hired after being interviewed by Supervisors Maxwell and Graham. His application disclosed that he had had "an arrest." In September 1966, he and six other Apple Street employees were apprehended by the police. At the time, Respondent (including Vice President Stine) was aware of the circumstances. Colley and Coleman were charged with carrying a concealed weapon and, at the trial 6 to 10 weeks later, both were convicted of a misdemeanor and given suspended sentences of 2 months. When informed of the results, his immediate supervisor, Maxwell, told Colley it was good the charge was reduced from a felony to a misdemeanor, "because it could have meant" his job. The information was noted in the personnel files. Testimony at some length was developed by Respondent in support of the contention that Colley had a "record of drinking" while at work. A supervisor at the Van Buren store testified that "several times" he observed Colley in a "highly intoxicated" condition at the store with his truck. However, he never actually saw Colley drinking, and he reported only one incident to his superior at the store, in late January or early February. The latter, as he testified, personally verified on this occasion that Colley had been drinking, and reported it to Supervisor Nicodemus at Apple Street. No attempt was made to

stop Colley from driving his truck away from the Van Buren store, Nicodemus did not speak to Colley concerning the incident, and nothing was entered on his record. In one other incident during the same time period, Nicodemus smelled alcohol on Colley's breath, referred the matter to Maxwell, and Colley was sent home for the remainder of the day. Colley in his testimony denied that he had been drinking on the job.

Colley testified that, on February 25, in the presence of Nicodemus and Maxwell, Stine told him he was terminated because he had been arrested during the time of his employment and that this was against company policy. Colley asked why they waited some 6 months after his arrest to discharge him. Stine said — "because higher authorities of the company didn't have any knowledge of his arrest." Stine testified he gave Colley two reasons: that he had been drinking on the job, and that he had been convicted of carrying a concealed weapon while he was an employee. Beerman testified that he saw "these applications" furnished him as a result of the investigation, and he noticed that a "week or two before" Colley was convicted for carrying a concealed weapon and that the reports included "some arrests on drinking." He was willing to overlook the "various minor offenses" disclosed as to other employees, but he considered it "very poor judgment used on Mr. Stine's behalf in the selection of" Rutledge and Colley, and he instructed that these two people be released.

It is to be assumed that, as of February 25, Beerman's knowledge of Colley's reported drinking stemmed from oral information supplied by the supervision and not from existing entries on Colley's employment records. Also, significantly, Coleman was not then discharged for the same known misdemeanor conviction in light of the asserted

company policy regarding employees with police records. Concerning the alleged strictness of the policy on police records, it is sufficient, *inter alia,* to refer to the hiring of John H. Rutledge to show that exceptions and disparities existed.[33]

The applicable considerations as to Colley have been definitely set forth in the discussions above relating to Rutledge. My findings are, similarly, that the factors of Colley's conviction, drinking, and prior police record were condoned or waived and were not the true motivation for his discharge. Colley signed a union authorization card the day after he was first solicited by Rutledge. For the reasons shown, it is not crucial that Respondent's actual knowledge of his union activities be demonstrated. Respondent failed to sustain the burden of disentangling the consequences as to Colley of the discriminatory course of investigation which it adopted. However, it fairly appears from the evidence of Respondent's animus and purpose of covertly engaging in surveillance that it was intent upon learning the identity of the prounion employees. In all the circumstances, the inference is warranted that Respondent at least suspected Colley's sympathy with the

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[33] In rebuttal at the hearing, the General Counsel sought to establish by testimony that a certain employee (Chambers) at the Apple Street warehouse had a record of felony convictions. Following discussions with the Trial Examiner, the parties were instructed to submit by stipulation after the hearing certified copies of this employee's police record, for which an exhibit was reserved. It appears that the General Counsel, unable to arrive at a stipulation with Respondent, unilaterally (and contrary to instruction) sent to the Trial Examiner certain police material pertaining to this employee. Thereafter, Respondent strongly objected and for its part submitted to the Trial Examiner affidavits and letters to refute the implication of the General Counsel's submission. All these post-hearing documents are placed in a rejected exhibit file. The Trial Examiner has entirely disregarded these submissions and deems it unnecessary to pursue the matter further.

Union. I conclude that Colley's discharge violated Section 8 (a) (3).

3. Group discharge

Supervisor Graham and five Apple Street drivers and helpers were discharged for the same reason given by Respondent, which it characterized at the hearing as a "slowdown." Numerous witnesses testified on both sides of the issue, with the factual question presented as to whether, on the morning of April 25, the dischargees were performing their work with no serious departure from the norm, or were singly or concertedly engaged in a form of misconduct significantly disruptive of their duties and of company discipline.

The general background has been described relating to the organizational efforts of the delivery employees, including the factor that the representation petition was administratively dismissed on April 13. The testimony[34] was uncontradicted that, since the Union's telegram on February 3, Vice President Stine came around everyday at the Apple Street warehouse, although his appearances theretofore were "rare" or once every 2 or 3 months. Several supervisors stated in a joint affidavit:[35] "It has been clear that during the two-week period prior to April 25 that these men had built up a great deal of animosity and hostility toward the company and its management officials. These employees never directly stated the nature of their grievances to the company." On Sunday, April

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[34] Graham and Lockett.

[35] The joint affidavit (not offered in evidence) was given to a Board agent by Stine, Hank, and Nicodemus. The quoted statement was affirmed in the testimony of Nicodemus.

23,[36] the yearly party was held at which annual bonuses were awarded by Respondent. At the hearing, Respondent's counsel specifically stated[37] that Respondent was relying, as basis for the discharges, upon knowledge it obtained that a concerted plan was formed at the bonus party that the drivers would engage in a slowdown — naming Coleman, Bledsoe, Pollard, Graham, Lockett[38] and Cameron, i.e., all the subsequent dischargees. On cross-examination, the question was then permitted to be put to Coleman, who denied knowledge of such a concerted plan.[39] No evidence was actually produced to support this firmly advanced position of Respondent or to show the source of such information.[40] Implied as a reason for the alleged plan for a slowdown was dissatisfaction with the bonuses received.[41]

Starting time for the drivers and helpers was 8 a.m.[42] They had no fixed time schedule in preparing their trucks for departure. Their regular procedure was to route their deliveries from sales tickets, (sort them stop by stop accord-

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36 On April 24, the drivers and helpers were off, although Supervisor Graham, among others, reported to work.

37 Upon questions of the Trial Examiner.

38 Lockett did not attend the bonus party.

39 Supervisor Graham was similarly questioned and he denied that he told Superintendent Hank after the bonus party "that trouble might occur." Hank was not asked to testify on this matter.

40 Respondent also alleged, but did not establish, e.g., that at the bonus party, Bledsoe, in a loud voice, "made a lot of inflammatory remarks which seemed to tie in —."

41 Bledsoe and Lockett each received a net bonus of $209, and Coleman $110; all three were employed less than 2 years. Graham's bonus in 1967 was $520, as compared with $650 in 1966.

42 Hereinafter, where convenient the morning hours will be shown without using the "a.m." designation.

ing to street), write up the manifest, load their trucks, service the trucks at a nearby gas station, and depart. The time each truck left from and returned to the warehouse varied with the number of deliveries and other factors. As earlier indicated, on their return they were at times sent out again with "specials" and were unable to complete their daily work until long after 5 p.m. Tuesday was usually "the heaviest day" in deliveries to be made. There were no rules which restricted them from talking, moving about, or fraternizing. In addition, for example, they took time during the morning for a break, or for refreshment when a concession truck stopped nearby.

On Tuesday, April 25, the delivery employees first reported back to work following the bonus party. That morning there were 10 drivers and 4 helpers, most of whom arrived before starting time.[43] At a very early hour, management was well represented on the scene.[44]

Warehouse Supervisor Nicodemus testified that, about 8:00 on April 25, he was in the delivery area and found Coleman, Rutledge (sic),[45] Lockett, Pollard all gathered in a group at one of the writing tables. "They were milling around and talking," first in loud and then in subdued tones for "perhaps a half hour." Up until 8:00, and right after, the "drivers were collecting and the mannerism was in a strained atmosphere." *Probably about 8:00,* Superintendent Hank told him not to say anything to anyone, that he, Hank, "would handle the situation." Vice President Stine testified he was at a meeting at one of

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[43] Bledsoe at 7:30-7:40, Cameron and Pollard at 7:50, and Coleman at 8:00.

[44] E.g., Nicodemus about 7:15; Hank 7:30; Maxwell at 7:45. Stine said he arrived about 8:50 (in conflict as described *infra*).

[45] Discharged February 25, *supra.*

the stores 4-5 miles from the warehouse, when he received a telephone call *between 8:15 and 8:30 from Nicodemus,*[46] who said "that the men were engaged in a slowdown, they had a hostile and belligerent attitude, that he couldn't control them." He told Nicodemus he would get down there as quickly as he could. Stine made no mention of a call from Hank. The latter testimony was given on General Counsel's examination of Stine under Rule 43 (b).[47] Later, when called by Respondent in presenting its defense, Stine altered his testimony: Nicodemus merely said "things were uneasy" and was just told by Stine to keep him informed. But about 8:30, Hank called and said, — "We have got real trouble. . . . They are not doing their jobs. There is a slowdown in progress." Hank also indicated that Kelley reported being told by Bledsoe that he was not to take his truck out that day, and that Bledsoe would stop him. Stine told Hank not to do anything until he got there.[48] He left at 8:30 and came to the warehouse about 8:50. After speaking to Stine, Hank instructed other supervision at the warehouse, e.g., Maxwell (but not Graham), — to say nothing to any of the men, "to just observe what was going on."

Continuing Nicodemus' testimony,[49] he described the

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[46] Nicodemus gave no testimony of such phone call.

[47] U.S. District Court Rules of Civil Procedure.

[48] Hank's version contained no reference to Bledsoe and Kelley, but added that he had told Stine then he "wanted to take some action."

[49] Nicodemus has his office in the warehouse building. He testified he is normally in and out of the delivery area checking on orders, which consumes a total of about 85 percent of his time. On April 25, he probably spent "a little more." His supervision of the drivers consists of "a general walk through" between 8:00 and 8:30. On this day, he did nothing other than his normal routine duties; he did not stand and watch, except maybe "five minutes, or so."

usual procedures which the drivers follow in the morning. At the tables, they sort their sales tickets for routing (half hour); write up the manifest (15-20 minutes); and load their trucks (½ to 1½ hours). On April 25, when they went to load, their "movements were not nearly so fast as they ordinarily would work." Asked to be specific as to what was actually said, he responded, ". . . it was more what they didn't say. These men . . . had been very willing to talk to me at all times, and this morning there was a lack of talking with me." Their "faces and their actions" were unusual. He said Graham came in at 8:30, his regular reporting time,[50] and immediately joined "this group." Nicodemus observed over a period of 2-2½ hours that Graham was not trying to get the men to load trucks and to carry out his other functions. But he said nothing to Graham about his work performance because he was instructed not to do so by Hank. Bledsoe was "the center of this group," and was "slow in his work." He does not recall what Lockett said but, in general, he was talking "loud and belligerent" to the other drivers. Pollard was "with the group" — which is "about the most" he could say in his case. At 9:00, he asked Coleman and Woods to accompany him in his personal car to pick up their trucks, which had been repaired at Fleming & Raney, a GMC dealer.[51] Coleman drove his truck back to the warehouse "at a slow pace,"[52]

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[50] Graham testified, and was well corroborated, that he arrived at 8:00 earlier than usual, because he had returns to write up which he could not do the previous Saturday when he had to drive a truck.

[51] Nicodemus apparently said nothing to Coleman enroute concerning the morning activity of the drivers.

[52] Woods testified they were gone 15 or 20 minutes, — a seemingly conservative estimate in view of all time factors reasonably considered.

and he was "slow in loading." Cameron was "very slowly routing his packages." Woods left the warehouse at 9:30; Kelley at 10:00; Lockett and Cameron at 10:30; Coleman around 11:00; and Bledsoe about 11:30, the last.

It is particularly significant to view the testimony of the employee witnesses called by Respondent. Donald Blakely, a driver, pointedly questioned on direct, said he heard no statements at the bonus party as to what might happen the following Tuesday. At 8:00 on April 25, Bledsoe told him, "Well, we have sent for Beerman." At first, he was busy getting his route. Later he glanced around and saw some of the fellows standing around "a little bit." Walter House, a helper assigned that day for the first time to work on Coleman's truck, testified that it seemed to him there was a little meeting at the desk by Bledsoe, Coleman, Lockett and Pollard between 7:30 and 8:15, although he himself was continually doing his work, and not standing and watching. He has seen employees standing around and talking before April 25, and has done so himself. He heard Bledsoe, Coleman and Lockett say they were dissatisfied with their bonus.

> Q. (Respondent's counsel) Did you hear anything about a boycott, or anything like that?
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> A. No, but I did hear it later on, they had this intent. . . . About a day later [April 26].[53]

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[53] Coleman was terminated upon his return from deliveries on April 25. House also sought to imply that, while on the route, Coleman was not trying to make his deliveries. For example, House repeatedly stated that they returned to the warehouse, between 6:30 and 7 p.m., with half of their deliveries; whereas Coleman testified they returned at 4:30 p.m. with just 4 of more than 20 deliveries. And he heard Coleman suggest that they park the truck on Third Street and not bring it back, but he thought that was "just talk." Respondent specifically relies on such factors in the discharge, although it could not have obtained this information until after Coleman's discharge. Particularly in this line of testimony, House was unconvincing and is

Paul Woods, a driver, arrived at 7:20. He said, "We were all just gathering around . . . which we normally do every morning, talking and working at the same time." Coleman and Pollard told him, — "Before any trucks go out we want to see Mr. Beerman . . .[54] about work conditions and the way the bonus was distributed, stuff in general that a lot of them thought they were getting a raw deal on." While Woods was there about 45 minutes all together, he saw Bledsoe engaged in loading his truck. John F. Jackson, a porter, had not been employed very long and did not know the names of the drivers. Between 8:00 and 8:30, he came through the delivery area and saw more than 6 of the men standing where they always gather every morning to write up the manifests. He heard Graham and others say they were dissatisfied with their bonus. Richard Kelley came in at 7:30 and started to work. Bledsoe came over and told him — "there was not any trucks going out that day." He asked what was going to stop them, and Bledsoe said, "we are." Bledsoe, Pollard, Coleman, and Cameron went over to the table and started talking — "for about an hour." He was working inside his truck, not watching them. As he left the truck, he could see they just stood around doing nothing. About 8:00 or 8:15, the key was missing from his truck parked outside. He spoke to Hank about it[55] and they searched for the key. It was found in the truck 20 min-

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not credited. It is noted, *inter alia*, that he refused to sign a statement he gave to a Board agent and then testified he gave no affidavit to Respondent, — following which Respondent stipulated it obtained an affidavit from House.

[54] He was specific that Coleman did not say — "we are not going to let any trucks out."

[55] His immediate supervisor, Graham, was not consulted regarding the missing key.

utes later. He departed at 10:30, and did not see Stine at all.

Hank testified,[56] *inter alia, t*hat between 8:00 and 8:10, he saw Coleman, Bledsoe, Cameron and Pollard gathered around the center table. He spoke to the men by name, e.g., "Good morning, Mr. Coleman," and received no response, – which is "unusual for this group of men." About 8:30, he noticed that Graham went to the table and joined the conversation. Kelley told him that Bledsoe said the trucks were not going out that morning and that the key to his truck was missing. Lockett and Cameron had left the center table, but Bledsoe, Pollard and Coleman were still standing there, hands in their pockets. There was a lot of calling back and forth between Lockett and these men. Some loud language and laughter were going on and he heard a vulgar term used. As noted *supra*, he called Stine between 8:30 and 8:45, and Stine arrived thereafter. On two or three occasions, he observed Cameron in his area, with his hands in his pockets. He was with Stine when Cameron approached and asked why they were watching him. Stine told Cameron "that he wasn't doing his job, and he should get that truck loaded, that he had spoken to him the previous week about this . . .; if he wasn't happy with the job he should hit the clock." Drivers can leave as late as 12 or 1:00 and return (as late as) 7:00 or 8:00 at night. The employees in question did perform their work during the morning of April 25.

Stine testified he arrived about 8:50. Bledsoe, Pollard and Coleman were between their trucks and not loading. Cameron and Lockett were standing with hands in pockets not doing their jobs. He heard loud and boisterous talk-

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[56] He stated that he generally spends 15 percent of his time in the delivery department at Apple Street.

ing and laughing by the five men, but did not know what they were saying. Graham was not friendly; he did not respond when Stine said "hello." He then discussed the situation with Hank, who said the men "were out of control" and wanted to fire them immediately. Stine disagreed "at this time" and stated he "felt for the security and safety of the building and for the people in it." Questioned on cross in what way the conduct "was creating some sort of disturbance," Stine explained:

> It wasn't one thing, it was many things. It was a whole room full of goings on, in this morning. It wasn't the joking, or it wasn't the talking, or it wasn't the roaming through the department, it wasn't the boisterous talk alone; it was everything. It was a lot of little inconsequential things.

He was concerned about safety.[57] About 11:40, after the last truck had left, he telephoned Beerman, told him what had taken place and recommended firing. Beerman did not ask the names of the men, but said if Stine felt this was the only solution, "then for the safety of the other people in the building," they should be terminated as they came back from their routes.[58] Stine immediately called "a contact" at the Dayton police station and requested that they send a representative when he began terminating these men. On examination by the Trial Examiner, he

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[57] However, he did not call the police then or at any time, did nothing to follow up the trucks on the routes and, when they returned, did not check on the condition of the trucks, the merchandise, or the drivers and helpers.

[58] Beerman testified that Stine called sometime between 9:50 and 10:30, and told him in effect that there was "almost an [in]surrection, or a revolution, over at the warehouse . . . a sitdown strike or some sort of rebellion." He instructed Stine to get the people involved off the payroll.

changed his testimony to indicate that he actually called Detective Hatton, privately employed by Respondent when he is off duty from the Dayton police force. Another off-duty police officer (Messer) working part time for Respondent came out to the Company. He, Stine, made the decision to discharge in this instance. Before doing so, he conducted no independent investigation and did not attempt to ask any of the dischargees what they were doing on April 25, the reason for their alleged misbehavior, or "anything of that kind." He testified that "the happenings of the morning of the 25th were the reasons for the discharge."[59] While Stine admitted that reasons for discharge and other vital information are entered in the personnel file of each employee, these were not produced by Respondent.[60] In the 3-month period preceding April 25, he had spoken to only "one man here" concerning the Union's attempt "to get in."

Each of the dischargees had a separate terminal interview with Stine, and various other persons present.[61] The first was Supervisor Graham about 2:30 p.m.; Cameron, Lockett and Coleman as each returned to the warehouse on April 25; Bledsoe and Pollard in the morning of April 26.

Graham and the employees were told the same reason

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[59] At the hearing Respondent purportedly relied on many additional incidents attributed to particular discharges, as treated *infra*.

[60] Testimony on events of April 25 by Respondent's witnesses Walter Houck and Scott Maxwell have not been set forth. Houck, in charge of bedding in the warehouse, added nothing in Respondent's favor. I do not credit Maxwell, whose regular functions lay outside the delivery department, — as I find he was prone to overstatement, characterization, and assumption of detailed knowledge which I do not believe he had.

[61] Different combinations of Hank, Nicodemus, and Maxwell, plus a man unknown to the employees called "Mecker" (or probably Messer). Stine added a "Mr. Haines" (unidentified) at Coleman's interview.

for discharge, quoted by Stine in his testimony under Rule 43 (b): "Because of what happened this morning, and evidently you are unhappy with the company, so the company is evidently unhappy with you, and you are terminated." This version is accepted as consistent with those individually given by the dischargees, although Stine altered his testimony when later called by Respondent.[62] Lockett, for example, testified that he responded: " 'How can a man averaging 130 to 150 stops, packages a day, be wasting time?' Plus I had had an old beat-up truck that wouldn't go over 20 miles an hour."

Respondent was permitted to cross-examine each of the dischargees concerning his behavior in the morning of April 25.[63] All in various forms denied specific questions that they stood around in small groups joking and laughing, that they worked slower than usual or were not doing their normal work that day. *Bledsoe* testified that, about 8:00 when he began his daily procedures, he saw "some of the big wheels around," naming Stine, Hank, Nicodemus, and Graham. About 11:45, he was summoned back from the gas station by Hank to put a dinette set on his truck. He said his truck was "full enough" and could not take any more. Nicodemus showed him how to load it, and it was done. However, in a half hour, he

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[62] Here he testified that he used the same language with each of the men — "that due to the belligerence and hostile attitude of this morning, and due to the insubordination and the lack of respect for the warehouse supervisors, that he evidently was too unhappy to work for our company and we are just as unhappy with him . . ." While the issue of what Respondent chose to tell these men is not of critical importance, I do not credit the similar additions related by Hank, testifying after Stine. The other supervisors nor "Mecker" or "Messer" were questioned.

[63] Although the questions were beyond the scope of the General Counsel's direct examination.

brought the dinette set back as refused by the customer, who said the instructions were to deliver it a week later. He and his helper, Pollard, made all of their 35 to 40 stops, including pick-ups. *Coleman* was a shuttle driver but was put on furniture delivery that day with House assigned as his helper. As Coleman was inexperienced on this job, Supervisor Graham had to instruct him and prepare his routing from the sales slips. After he was loaded up at 11:00, he had to wait at the service station because there were 4 trucks ahead of his to get to the gas pump. When Bledsoe was called back to the warehouse, he went along to offer help. Stine told him Bledsoe's truck was not his business and ordered him back to his own truck. Of more than 20 deliveries of furniture, he brought back only 4 because he did not know where the streets were. He saw Stine at the warehouse at 8:01. *Cameron* testified that the whole time he was loading his truck Stine was standing "right in the middle" watching him. He asked Stine if he was doing something wrong, and Stine said, "no." He made all of his deliveries that day. He denied that at this termination interview Stine referred to his behavior on April 25 or to Stine's disappointment with his work "during the previous week."[64] *Pollard* testified he worked no "differently this day than any other day." He denied that he and Bledsoe told Woods "that no trucks were going out that morning" (but he was not asked what he did tell Woods), and that he heard conversations between the drivers that morning "in which they stated they were angry and upset about their bonus." *Lockett* testified that he had not loaded the packages for Englewood, and Hank called him back from the service

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[64] Respondent's counsel asserted that in the termination interview Stine mentioned certain incidents of the previous week involving Cameron. However, when called, Stine did not so testify.

station to put them on his truck. He explained to Nicodemus he had 140 packages already, and in order to drop them off in 8 hours, — "why you'd got to be humping," i.e., moving very rapidly, and he had "an old raggedy truck that is no good, and brakes." He did load and deliver these added packages.

Graham testified that when he arrived at 8:00 Stine and Hank were there. Thereafter, he saw them "just standing and watching." They did not say a word to him, nor to the other employees so far as he observed. The men were performing as usual, — "just like it always was." The drivers "always holler, . . . 'where is that street?' and this and that information." His function was to get the men off on time, but "there wasn't never any time stipulation." After routing out Coleman, he was writing up the returns and was busy throughout the morning. Kelley, who had an out-of-town furniture route, departed earlier than usual. Stine and Hank helped him load[65] and kept saying, "let's get Kelley out of here." Hank approached him about folding pads which were lying in a corner. Hank told him, — "Get Bledsoe to fold them." Bledsoe was running into trouble preparing his route. He had to keep running upstairs to get furniture orders that should have been ready in the delivery area. Graham advised Bledsoe, "Go ahead, I'll fold them myself." Hank later "jumped" Graham, — "I told you to tell that driver to fold them." Graham said, "Mr. Hank, he was running late." Hank replied, "I don't care how late. If he don't get back until 10:00 o'clock I want him to fold the pads."

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[65] Denied by Stine and Hank.

Conclusions

As to Coleman, Pollard, Bledsoe, Cameron and Lockett, the broad issues appropriately raised are whether they were discharged for conduct which constitutes protected concerted activity under Section 8 (a) (1),[66] or to discourage their union membership in violation of Section 8 (a) (3). As to either theory of violation, it is initially to be determined whether the grounds advanced by Respondent for the group discharge relating to the events of April 25 are substantially supported in the evidence. As shown, considerable testimony by numerous witnesses was adduced on both sides, giving rise to obvious questions of credibility. In resolving these questions, I have considered, *inter alia,* the demeanor of the witnesses; their candor or lack thereof; their apparent interest or prejudice; the extent of contradiction or corroboration; leading questions of counsel; and the character, consistency, and inherent probability of the testimony. Concerning the pertinent events, the record does not present a conflict between the entire line of witnesses of General Counsel as opposed to that of Respondent. Here employee witnesses who were called by Respondent, as well as Supervisor Nicodemus in significant part, effectively substantiate the factual account given by the separate dischargees, — which in light of the whole record I am disposed to credit. Collaterally, I have observed that a vein of dissimulation runs through much of Stine's testimony in the case. And as to Beerman, for example, it seems inordinately strange that he ostensibly remained in the background and desired no details from

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[66] Section 7, in part, accords employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," and Section 8(a)(1) prohibits employers from interfering, restraining, or coercing employees "in the exercise of the rights guaranteed in section 7."

Stine regarding the reported "insurrection" on April 25, as contrasted with his intimate personal involvement in the discharge of Rutledge and Colley.

In my opinion, there is no believable evidence which would remotely justify, upon ordinary standards, a basis for fear in Respondent that the conduct of any of the dischargees posed a threat to safety of person or property.[67] Indeed, the converse would appeal. Despite the early determination and instruction of Stine merely to observe and refrain from speaking to these supposedly volatile miscreants, the top supervisors did not hesitate to hover over these individuals, to bring them back from the service station, to create or enlarge upon incidents, and to seek out grounds for criticism of their routine functions with no real consideration of the merits. Notwithstanding these handicaps, the dischargees did perform their day's work as reasonably to be expected and in conformity with their customs in the past. There was no slowdown or other cognizable misconduct in actuality.

It can hardly be disputed from Respondent's own testimony that a decision to discharge had been reached in the mind of management virtually at, or shortly beyond, the starting time for work of these individuals. Effectuation of the decision was only delayed, as I find, so that Respondent could build up more plausible appearing pretexts for the action. Respondent's asserted reliance, at the hearing and in its brief, upon a multiplicity of clearly fictitious grounds for the discharges discloses rather a lack of sincerity in its defenses, and additionally supplies an element in support of General Counsel's *prima facie* showing of unlawful motivation.

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[67] It is noted that Respondent's private police were summoned to be present, after the events, at the discharge interviews.

From admissions of Respondent and from all the evidence, it is fairly apparent that Respondent was alerted to avert a demonstration of concerted action by employees in the delivery department prior to starting time on April 25. It [sic] also plain that from the moment of their arrival at work on April 25, Coleman, Pollard, Bledsoe, Cameron and Lockett, as well as Graham, were singled out for surveillance on the job by the posted supervisors.[68] These were in fact all the identified individuals as to whom Respondent stated that it obtained information that they had formed a concerted plan at the bonus party on April 23 to engage in a slowdown. Indeed, evidence of general identification of these individuals extends considerably prior to the bonus party. In the joint affidavit, *supra,* Respondent itself concedes that in the 2-week period before the bonus party, "these men had built up a great deal of animosity and hostility toward the company." The same employees were at the union hall in early February, had there signed new union authorization cards, and paid the union dues of $17 each. Findings have already been detailed as to Respondent's actions to establish a system of surveillance, its animus and coercive conduct respecting the Union, and its discriminatory discharge of the union leader, Rutledge, and of Colley. In addition, I attribute relevant significance to Beerman's remark to Stine and Hank on February 17 that "there were too many black boys down here, to get rid of them."

Respondent's argument is without substance that the union campaign was over and that it could therefore have had no discriminatory motive for discharging these employees. As earlier noted, the representation petition had

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[68] See, e.g., *N.L.R.B.* v. *Yale Mfg. Co.*, 356 F. 2d 69, 74 (C.A. 1), enfg. 150 NLRB 1102.

been administratively dismissed on April 13 for failure of a showing of interest based on a larger unit than originally sought by the Union. It does not follow that such dismissal would abruptly halt the union campaign or cause the employees to abandon their adherence to the Union or desire for representation. Indeed, it could well operate to the contrary. Respondent knew that seriously felt grievances continued to exist, — despite Beerman's promises on February 17, his instruction to employees to refuse work after 5 p.m., and his broad invitation that the employees come directly to him with their grievances. Ironically, Respondent precipitately decided upon the discharge action on (or before) April 25 without even attempting to discuss with employees the nature of their complaints. Furthermore, unfair labor practice charges were pending since February 27, and an initial complaint herein formally issued against Respondent on April 24. At least in the period following dismissal of the petition, and at the bonus party on April 23, it is reasonably inferrable that Respondent became acutely aware or believed there was a resurgence of activity or renewal of the union effort by employees in the delivery department, and that the same individuals were involved as had earlier supported the Union. All the circumstances are substantially present to warrant a finding that Respondent decided to seize upon an opportunity on April 25 to administer a coup de grace to the continuing threat of union representation among these drivers and helpers. More especially in the full context shown, the fact that all of these employees discharged were subscribed union proponents creates a strong inference of unlawful discrimination.[69] Respondent failed to demonstrate legiti-

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[69] E.g., *N.L.R.B.* v. *Camco Incorporated*, 340 F. 2d 803 (C.A. 5); *Ertel Manufacturing Corp.*, 147 NLRB 312, enfd. 352 F. 2d 916 (C.A. 7).

mate and substantial justification for the discharge.[70] Accordingly, upon the entire record, it is my conclusion that Respondent terminated Coleman, Pollard, Bledsoe, Cameron and Lockett to discourage union membership and activity in violation of Section 8 (a) (3).[71]

In relation to the "happenings" of April 25, the essential facts described above apply as well to Graham. Respondent had continued for some time to take the formal position that Graham was not a supervisor. In the complaint issued on July 28, General Counsel included Graham as an employee in the group discharge on April 25 and 26. However, as already shown, Respondent stipulated Graham's supervisory status during the course of the hearing. General Counsel's theory as to Graham was altered at this point although it was still materially within the framework of the complaint. During the pertinent period of the discharge action, Graham was not taken into the confidence and councils of Respondent on matters which would normally concern him as the immediate supervisor of the employees involved in the purported acts of misconduct. Respondent had earlier knowledge of his lack of cooperation in its unlawful attempts to undermine the union campaign. Particularly, he had failed to carry out repeated instructions to engage in surveillance and obtain the names of union adherents during the campaign, and so incurred the displeasure of Respondent. There are ample grounds to find that Respondent was aware or strongly suspected the fact of Graham's sympathy with the organizing aspirations of the employees. For a time preceding and on April 25,

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[70] *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26.

[71] See *O'Keeffe Electric Co.*, 158 NLRB 434, 438, enfd. J-4979 (C.A. 9 March 6, 1968); *State Electric Company*, 157 NLRB 504, 513; *Arnoldware, Inc.*, 129 NLRB 228, 229.

Respondent treated Graham in the same manner as it did the selected prounion employees and finally grouped him for discharge together with these employees. The true reason for Graham's discharge was his sympathetic attitude toward the Union, and as I find, in substantial part for his refusal to participate as instructed in Respondent's unlawful antiunion course of conduct. Especially in view of Respondent's known union animus and prior acts of coercion, it is reasonable to infer that the real grounds for Graham's discharge were fully registered upon the employees. It was thus demonstrated to them the extreme measures which Respondent would undertake to thwart their self-organizational rights. Notwithstanding his supervisory status, it is found, in accordance with settled precedent, that Graham's discharge violated the rights of employees under Section 8 (a) (1).[72]

As an additional or alternative ground, I find that the discharge of Coleman, Pollard, Bledsoe, Cameron and Lockett independently violated Section 8 (a) (1). It was peculiarly self-serving for Respondent to characterize as a slowdown the employee activity which it anticipated upon the asserted but unproven information it obtained from the bonus party on April 23. In fact there was no concerted plan, threat, or effectuation of an organized slowdown, nor any disruption of production or disturbance. The evidence does show, however, that before and about the starting time of 8 a.m. on April 25, there were signs of an incipient effort by certain employees to engage in some kind of concerted protest to Respondent concerning their grievances. Respondent's employee witness, Woods, gave a credible summary of the contemplated activity before 8 a.m. — while "we were all just gathering around."

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[72] E.g., *N.L.R.B.* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 208 (C.A. 5); *General Engineering, Inc., etc.*, 131 NLRB 648, 650.

He was then told by Coleman and Pollard, that, before any trucks go out, the employees wanted to see Beerman about work conditions, the bonuses, and "stuff" in general that a lot of them thought they were getting a raw deal on." These were unsophisticated employees, unassisted at this time by experienced advice. Their effort never reached the stage of an overt stoppage of any kind. It was abandoned at the outset quite probably because of Respondent's presence and preparedness in force.

In cannot find that Respondent was realistically expecting an organized slowdown, — which is a form of misconduct well known in the cases to justify discharge.[73] Consistent with the evidence, it is far more plausible, and concluded, that Respondent was anticipating some attempt at a strike or concerted protest, and that it determined to abort any such movement and to get rid of selected individuals as the perpetrators. By its nature such contemplated activity by employees is manifestly within the protection of Section 7. The discharge of employees for the reasons based upon the belief, even if erroneous, that they were planning or engaging in a protected concerted activity violates Section 8 (a) (1).[74] Furthermore, as a fundamental matter, the discussions among these employees of their grievances and their consideration of a means of protest on and before April 25 constituted protected concerted activity.[75]

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[73] E.g., *N.L.R.B.* v. *Blades Mfg. Corp.*, 344 F. 2d 998, 1004 (C.A. 8); *General Electric Company*, 155 NLRB 208, 221; *Elk Lumber Company*, 91 NLRB 333, 337.

[74] *Burnup and Sims, Inc.*, 379 U.S. 21; *Cusano d/b/a American Shuffleboard Co.* v. *N.L.R.B.*, 190 F. 2d 677 (C.A. 1); *N.L.R.B.* v. *Sea Land Service, Inc.*, 356 F. 2d 953 (C.A. 1), enforcing 146 NLRB 931.

[75] *Indiana Gear Works, a Division of the Buehler Corporation*, 156 NLRB 397, 400-401; *Quaker Alloy Casting Company*, 135 NLRB 805; *Gibbs Corporation*, 124 NLRB 1320.

Indeed, the protection would clearly extend even to the discussion of plans to engage in a concerted slowdown, short of a real threat or actual consummation thereof, and so long as it remained in the area of speech and conversation.[76]

"Union [or concerted] activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious state if innocent employees can be discharged while engaging in it, even though [as I do not find here] the employer acts in good faith."[77]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate and substantial relation to trade, traffic, and to commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In my opinion,

[76] "The Act was designed primarily to guarantee employees the right to organize and to engage in joint action calculated to further their mutual interests, and it would be inconsistent with this purpose to construe section 7 in such a way as to exclude from its protection speech supporting such joint action." *Signal Oil Co.* v. *N.L.R.B.*, 67 LRRM 2708, 2711 (C.A. 9).

[77] *N.L.R.B.* v. *Burnup and Sims, Inc.*, 379 U.S. 21, 23.

a broad cease and desist order is warranted, particularly by reason of the discriminatory discharges.[78]

It has been found that Respondent unlawfully discharged Coleman, Pollard, Bledsoe, Cameron, Lockett and Graham. It will therefore be recommended that Respondent offer to these individuals immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings suffered by reason of their unlawful termination, by payment to them of a sum of money equal to that which they normally would have earned from the date of their discharge to the date of Respondent's offer of reinstatement, less net earnings during such period, with backpay computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289. Backpay shall carry interest at the rate of 6 percent per annum, as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. Further, it will be recommended that Respondent preserve and make available to the Board, upon request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine the amounts of backpay due and the rights of reinstatement under the terms of these recommendations.

Upon the foregoing findings of fact, and upon the entire record in the cases, I make the following:

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

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[78] *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426; *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4).

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. By discriminatorily discharging James E. Coleman, Charles Pollard, Millard Bledsoe, George Cameron, and Roosevelt Lockett, thereby discouraging membership in the Union, Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

4. By discharging the above-name employees for engaging in protected concerted activities, and by terminating the employment of Charles Graham, a supervisor, Respondent has independently interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

5. By the foregoing, and by other acts and conduct interfering with, restraining and coercing employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the cases, it is recommended that Respondent, Elder-Beerman Stores Corp., Dayton, Ohio, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union #957, or in any other labor organization, by discharging employees, or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

(b) Discharging or otherwise disciplining employees for engaging in concerted activities protected in Section 7 of the Act.

(c) Discharging or otherwise disciplining any supervisor because he has failed or refused to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7.

(d) Coercively interrogating employees concerning union activities or sentiments; promising or granting them benefits to discourage their union membership or support; requesting or instructing employees to engage in surveillance or to act as informers regarding the union activities of other employees; bargaining directly or individually with employees in the face of a question concerning representation; or instructing any supervisor to engage in surveillance or other conduct constituting coercion under Section 7.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the right guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer James E. Coleman, Charles Pollard, Millard

Bledsoe, George Cameron, Roosevelt Lockett, and Charles Graham immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings, as set forth in "The Remedy" section of the Trial Examiner's Decision.

(b) Notify the above-named individuals if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Preserve and make available to the Board or its agents all payroll and other records, as set forth in "The Remedy" section of the Trial Examiner's Decision.

(d) Post at its Apple Street warehouse in Dayton, Ohio, copies of the notice attached hereto as "Appendix."[79] Copies of said notice, on forms provided by the Regional Director for Region 9, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Trial Ex-

---

[79] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

aminer's Decision and Recommended Order what steps Respondent has taken to comply herewith.[80]

Dated at Washington, D.C. April 3, 1968.

/s/ BENJAMIN B. LIPTON
Trial Examiner

APPENDIX

Form NLRB-4635A (11-65) TDX-207-68

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDED ORDER OF A
TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(as amended)

we hereby notify our employees that:

WE WILL NOT discharge or otherwise discriminate against employees in order to discourage membership or support for INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION #957, or any other labor organization.

WE WILL NOT discharge or otherwise punish any employees for talking or acting together for the purpose of collective bargaining or other mutual aid or protection.

---

[80] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

WE WILL NOT discharge or otherwise punish any supervisor because he has failed or refused to spy on your union activities or engage in other conduct interfering with your rights under the National Labor Relations Act.

WE WILL NOT ask you anything about a union or who is in the union or who favors the union in a manner which would coerce you regarding your rights under the Act.

WE WILL NOT ask any employee to spy on other employees and report to us who joins a union or who works for it.

WE WILL NOT promise or give you any benefits in order to discourage your union activities or membership.

WE WILL NOT instruct any supervisor to spy on your union activities and report to us who joins a union or which employees want or favor a union.

WE WILL NOT bargain directly or individually with you as employees where a union has requested us to bargain with it as your representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the right guaranteed employees in the National Labor Relations Act.

Since it has been found that we unlawfully fired the persons named below, WE WILL offer to give them back their jobs and seniority, and WE WILL pay them for the earnings they lost, plus 6 percent interest.

JAMES E. COLEMAN
CHARLES POLLARD
MILLARD BLEDSOE
GEORGE CAMERON
ROOSEVELT LOCKETT
CHARLES GRAHAM

All our employees are free to become or remain, or to refrain from becoming or remaining, members of any labor organization of their choice, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act, as amended.

ELDER-BEERMAN STORES, CORP.
(Employer)

Dated ..... By .....

NOTE: We will notify the above-named persons if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407, Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 684-3663).

Errata

(CAPTION OMITTED)

Cases Nos. 9-CA-4205-1, 9-CA-4205-2, 9-CA-4264

ERRATA

(Filed April 5, 1968)

The Trial Examiner's Decision in the subject case is hereby corrected as follows:

On page 25, under "Conclusions of Law," insert in paragraph 3 after the word "discharging" the names "John H. Rutledge, Revosie L. Colley." And in paragraph 4, delete the words "the above named employees" and insert instead "James E. Coleman, Charles Pollard, Millard Bledsoe, George Cameron, and Roosevelt Lockett."

In the "Notice To All Employees," add to the list of names under first paragraph in Appendix ii the names "John H. Rutledge and Revosie L. Colley."

/s/ BENJAMIN B. LIPTON
Trial Examiner

Dated: April 5, 1968
Washington, D.C.

Supplemental Errata

(CAPTION OMITTED)

Cases Nos. 9-CA-4205-1, 9-CA-4205-2, 9-CA-4264

SUPPLEMENTAL ERRATA

(Filed April 12, 1968)

On page 24, second paragraph under "The Remedy," and on page 26, paragraph 2(a), insert "John A. Rutledge, Revosie L. Colley," immediately preceding list of names.

/s/ BENJAMIN B. LIPTON
Trial Examiner

Dated: April 12, 1968
Washington, D.C.

APPENDIX D –
STATUTES AND CONSTITUTIONAL PROVISIONS

National Labor Relations Act, Section 2(3)

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or any other person who is not an employer as herein defined."

Labor Management Relations Act, Section 7

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Labor Management Relations Act, Section 8

"(a) It shall be an unfair labor practice for an employer —

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;"

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;"

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Labor Management Relations Act, Section 10

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause, to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint."

"(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the

Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

National Labor Relations Act, Section 14(a)

"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

United States Constitution, First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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No. 1174

In the Supreme Court of the United States

OCTOBER TERM, 1969

THE ELDER-BEERMAN STORES CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 26) is reported at 415 F. 2d 1375. The Board's decision and order (Pet. App. 28–86) are reported at 173 NLRB No. 68.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1969, and a petition for rehearing was denied on November 14, 1969 (Pet. App. 26, 27). The petition for a writ of certiorari was filed on February 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the findings of the National Labor Relations Board that the company violated Section 8(a)(1) and (3) of the National Labor Relations Act by engaging in various forms of restraint and coercion and by discharging employees because of their union or other protected activity.

2. Whether the Board's procedure was fair and proper.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition (Pet. App. 87–89).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On February 2, 1967, the International Brotherhood of Teamsters, Local Union No. 957, held an organizational meeting among the truckdrivers and helpers of the Company's Apple Street warehouse in Dayton, Ohio (Pet. App. 36; R. 18).[1] At least eight employees attended, all of whom signed authorization cards and paid union dues (Pet. App. 36, n. 4; R. 18, 106–107, 108). On February 3, the Union notified the Company by telegram that it "represented a majority," and on February 6 it filed an election petition with the Board (Pet. App. 36; R. 5–6).

[1] "R." references are to the Appendix to the parties' briefs filed in the court below.

Vice President of Operations Harry Stine brought the Union's telegram to the attention of Charles Graham, the immediate supervisor of the Apple Street warehouse drivers and helpers, and asked him to "keep [his] eyes and ears open and to report anything suspicious to him" (Pet. App. 39; R. 68). Stine explained that since Graham was a Negro he could "get in with these guys because the majority of them were Negroes and [he] could be an inside man for [Stine]." Stine told Graham "to fraternize" with the employees and "[s]ee if [he] could find a list of names." Although Graham agreed to report any information he might discover concerning union activity and was asked for a report each day until mid-April,[2] he failed to furnish any information (Pet. App. 39; R. 69–70). On several occasions, Stine and Superintendent of Warehousing Virgil Hank—the overall supervisor of the Apple Street warehouse and another warehouse on Helena Street—called Graham a "poor supervisor" because of his failure to submit a report of union activity among the employees (Pet. App. 39; R. 73).

In early February, Joseph Rutledge, an employee at the Helena Street warehouse and a brother of John Rutledge, the employee who had instigated the union campaign at the Apple Street warehouse (Pet. App. 36; R. 17), was summoned to Stine's office. When Joseph denied knowledge of the Union's telegram,

[2] On April 13, the Union's election petition was dismissed by the Board's Regional Director for lack of a sufficient showing of interest among the unit employees (Pet. App. 37).

Stine asked him if he would accept a work assignment at Apple Street in order to obtain information for the Company concerning the union activities there. Joseph Rutledge suggested that this was a poor idea because "the fellows" would know why he was there. Stine then asked Joseph if his brother, John, was "in on it" and whether John would tell him anything. Joseph replied that he did not know whether John was involved with the Union, and did not think that John would tell him "anything that might be going on down there." Stine asked Joseph to keep him informed if he "heard anything about the situation" (Pet. App. 38; R. 9–10). About two weeks later, Joseph was again summoned by Stine. He was given a wage increase and was asked if he had heard anything concerning the Union. He said no, and Stine retorted, "You are a poor detective" (Pet. App. 38).

On February 17, President Arthur Beerman called a meeting, during working time, of all the drivers and helpers at the Apple Street warehouse. He stated that the Company had received a telegram from the Union concerning their desire to be represented. He added that he understood "14 or 15 fellows" had paid the Union $17 of their hard-earned money; that if they could spend $17 foolishly to try to get a union in the warehouse, he could spend $17,000 to keep it out; that he was "a fair-minded man" and if they had grievances he could "be reached at any time"; that the employees did not need an outside representative, and, if they had come straight to him instead of going to the Union, he would have made things better for

them; that he knew "there are discrepancies in the pay rate here, and this will all be taken care of," but his "hands are tied right now" because "[a]n election is coming up, and [he] can't do anything about [their] raises until this is over with." Beerman also discussed current Company benefits; the insurance plan, the retirement plan, and the "baby bonus"—gift certificates for Company drivers employed from one to two years, and $550 or more for those employed over two years (Pet. App. 41–42; R. 19–21, 36–37, 43–44, 51, 75).

Executive Vice-President and General Manager Max Gutman, Vice-President Stine, and other Company representatives were present while Beerman spoke to the drivers (Pet. App. 36; R. 19, 36). After Beerman finished, he invited questions from the employees. Employee Bledsoe complained about the overtime, when the employees were instructed to deliver "specials" after they had completed their regular deliveries. Beerman replied, "This will cease * * *. The next time anybody asks you to take anything out after five o'clock, tell them to go to hell, and call me" (Pet. App. 42; R. 21–22, 44). Subsequent to this meeting, the following discharges ensued:

1. John Rutledge, the instigator of the union campaign, was employed by the Company in September 1966 as a driver at the Apple Street warehouse. On his application for employment, Rutledge indicated that he had a police record and a back disability (Pet. App. 47; R. 13–14). Two or three weeks after he was hired, Rutledge was permanently placed on a package

route as a delivery driver. On several occasions, he was commended by various supervisors and was advised that he was "at the top of the list for a raise" (Pet. App. 48; R. 16).

On February 17, 1967, while Vice-President Stine was speaking to Supervisor Graham about the Union, Stine stated that "Rutledge seemed to be the smartest one of them and he had him figured out to be the leader" (Pet. App. 48; R. 70). On February 25, Rutledge was summoned to the warehouse office. In the presence of Warehouse Manager Nicodemus and his assistant, Maxwell, Stine told Rutledge, "John, we have been doing a little review of your application, and due to your police record and back condition the Company can no longer keep you under [our] employment." Rutledge protested that the Company knew of these matters from the time he was hired. Stine replied that there were certain incidents concerning his police record that Rutledge had omitted in his employment application[3] (Pet. App. 48; R. 24, 65–66). Rutledge was discharged effective that day (Pet. App. 48; R. 24).

2. In March 1966, Revoosie Colley was hired by the Company as a driver, with knowledge that he had a previous arrest (Pet. App. 54; R. 35). On Septem-

[3] Stine referred to a fugitive charge which Rutledge did not mention at the time of his hire. The charge grew out of an arrest "for speeding in Germantown, Ohio, in 1951"; Rutledge was "released to return four days later to pay [his] fine"; he "didn't appear and the police picked [him] up two days later and [he] was taken back to Germantown to pay [his] fine" (Pet. App. 49, n. 23; R. 65–66, 208).

ber 2, 1966, Colley and six other Apple Street warehouse employees were arrested. He and employee Coleman were charged with carrying a concealed weapon; at the trial, 6 to 10 weeks later, both were convicted of a misdemeanor and given suspended sentences of 2 months. The Company was apprised of each step of the criminal proceedings, and pertinent notations were placed in Colley's personnel file. Maxwell told Colley "it was good" that the charge was reduced from a felony to a misdemeanor because, otherwise, "it could have meant" his job (Pet. App. 54; R. 38–40, 48–50).

In January 1967, Colley was solicited by John Rutledge to support the Union. On the following day, Colley signed an authorization card and returned it to Rutledge (A. 34). On February 2, Colley attended the union meeting, where he signed another card and paid union dues (Pet. App. 36, n. 4; R. 34). On February 25, Colley was summoned to the warehouse office, where Vice-President Stine advised him that he was discharged because, while employed by the Company and contrary to its policy, he had been arrested. Colley asked why the Company waited "some six months" after his arrest to discharge him. Stine replied, "because higher authorities of the company didn't have any knowledge of [his] arrest" (Pet. App. 55; R. 37–38, 40).

3. On April 25 and 26, five more drivers who had signed union authorization cards—Coleman, Bledsoe, Cameron, Lockett, and Pollard—were discharged (Pet. App. 57, 66–67, 36, n. 4). Thus, on the morning of April 25, management representatives Hank, Nico-

demus, and Maxwell were present at the Apple Street warehouse at starting time, allegedly because the Company had heard that some of the employees were planning a slowdown (Pet. App. 57–58; R. 163, 229). Although the five employees discussed among themselves, for about a half hour, the employee dissatisfaction (Pet. App. 75–76; R. 142–144, 122–123, 129, 163–164), they completed a full day's work in the usual time (Pet. App. 71). Cameron returned to the warehouse from an unfamiliar route at about 4:30 p.m., with only 4 packages remaining out of more than 20 furniture deliveries (Pet. App. 68; R. 59). Lockett delivered 137 packages, returning to the warehouse at approximately 5:30 p.m. with only 3 packages (Pet. App. 67; R. 109–110). Bledsoe and helper Pollard completed 35 to 40 furniture deliveries, returning to the warehouse at approximately 7 p.m. (R. 91–92, 103).

Cameron, Coleman, and Lockett were discharged when they returned to the warehouse. Each was told by Stine that he was discharged, "Because of what happened this morning, and evidently you are unhappy with the company, so the company is evidently unhappy with you, and you are terminated" (Pet. App. 66–67; R. 61). Pollard and Bledsoe were discharged by Stine the following morning when they reported to work (Pet. App. 66; R. 88–89, 101–102).

4. Earlier in the afternoon of April 25, Supervisor Graham was summoned to Manager Nicodemus' office and, in the presence of Superintendent Hank, was discharged by Vice-President Stine. He also was told

that he was being terminated because of "what happened this morning" and because of his evident unhappiness with the Company. (Pet. App. 66–67; R. 75–76, 201.)

B. THE DECISIONS BELOW

The Board found that the Company restrained and coerced its employees in violation of Section 8(a)(1) of the Act by interrogating employee Joseph Rutledge about union activity; by asking him to spy on such activity (Pet. App. 29, 39–40); and by President Beerman's speech of February 17, promising the employees benefits if they rejected the Union and dealt directly with him (Pet. App. 30, 45–47). The Board further found that the Company violated Section 8(a)(3) by discharging Rutledge and Colley, not because of their newly discovered criminal records, but because of their union adherence (Pet. App. 29, 47–57). The Board also found that there had been no slow-down on April 25 (Pet. App. 71), but that the Company, in violation of Section 8(a) (3) and (1), had discharged employees Coleman, Bledsoe, Cameron, Lockett, and Pollard because of their union activity and because they had expressed dissatisfaction with employment conditions during the morning of April 25—activity protected by Section 7 of the Act (Pet. App. 29–30, 73–74, 75–76). Finally, the Board found that Supervisor Graham was discharged because he refused to engage in surveillance for the Company so that it could discover the identity of union adherents, and that, in these circumstances, the instructions to Graham and his discharge interfered

with employee rights in violation of Section 8(a)(1) of the Act (Pet. App. 30–31).

The Board ordered the Company, *inter alia,* to offer the discharged employees reinstatement with backpay, to cease the unlawful activities found, and to post appropriate notices (Pet. App. 80–84). The court of appeals, in a *per curiam* order, found the Board's decision to be supported by substantial evidence and enforced its order in full (Pet. App. 26).

ARGUMENT

1. Many of the questions raised by petitioner are not presented on this record. Thus, petitioner's contention that Supervisor Graham and the five drivers were lawfully discharged is based on its premise that they participated in a slowdown (Pet. 20–23); however, the Board found (Pet. App. 71, 73-76), and the court of appeals sustained its finding, that there was no slowdown and that these individuals were discharged because of their union and concerted activity.[4] Similarly, petitioner's contention (Pet. 23–24) that President Beerman's speech merely entailed a discussion of certain benefits is contrary to the Board's finding (Pet. App. 45–47), which the court of appeals ac-

[4] It is well settled that an employer violates Section 8(a)(1) of the Act by discharging a supervisor because he refuses to engage in surveillance or other conduct which would restrain employees in the exercise of their organizational rights, and that the Board is empowered, as a remedy for that unfair labor practice, to order the supervisor reinstated. *Local No. 207, Assoriation of Bridge Workers* v. *Perko*, 373 U.S. 701, 707.

cepted, that, in the context of Beerman's antagonism to the Union, his remarks were coercive and designed to induce the employees to abandon the Union and bargain directly with him. Petitioner's challenge to these findings thus presents only evidentiary issues, which do not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

2. Petitioner's allegations of procedural unfairness similarly raise no issues warranting further review. Although the complaint (R. 256) did not specifically allege that the discharge of the five drivers was due to their concerted protest over employment conditions as well as their union activity, the former issue was litigated at the hearing (R. 62–63, 55), and dealt with by petitioner in its brief to the Trial Examiner (pp. 33-34). Since the issue was thus tried by the parties, the Board, contrary to petitioner's contention (Pet. 14–16), properly based a finding on it even though it had not been specifically pleaded. *National Labor Relations Board* v. *Mackay Radio Co.,* 304 U.S. 333, 349–350. Nor was petitioner prejudiced (see Pet. 12–14) by the Board's refusal to name Joseph Rutledge and Graham in the complaint as the employees whom Vice-President Stine was alleged (R. 255) to have interrogated concerning the union activities of other employees. Petitioner knew that Stine's activities were in question and clearly could have obtained from him detailed knowledge of his conduct; significantly, petitioner at no time explained how it was handicapped

in preparing its defense by not knowing the employees' identity before the hearing.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

MARCH 1970.

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[5] In order to protect employees against reprisals, the Board ordinarily does not identify employees who have been restrained or coerced until they have been called to testify at the hearing. It does specify the date on which the alleged unfair labor practice occurred and the management representative involved. A similar policy is followed with respect to the employees' pre-trial statements. See 29 CFR 102.118(b)(1).

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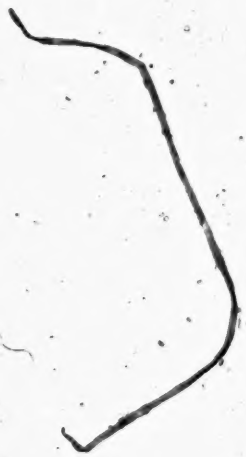

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OCTOBER TERM, 1969

THE ELDER-BEERMAN STORES CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The Respondent Board's brief attempts to sweep all the questions raised by the petition for certiorari under the rug and thus avoid them by the well known stratagem of claiming that all the issues raised were evidentiary and therefore not ordinarily subject to review here. This clever contention to avoid meeting the issue is not borne out by the record as will be shown below. As part of the same strategy the Board's brief summarily treats the few points it deigns to discuss as if they were really unworthy of attention. We submit that the issues raised are presented on the record and deserve not only the serious

consideration of this Court but require resolution by a decision of this Court on the merits.[1]

QUESTION I.

The Board's brief at page 11 admits that the Board refused to identify Joseph Rutledge and Graham as the "employees" Vice President Stine was alleged to have unlawfully interrogated. Indeed the Board even refused to state the time or place of the alleged interrogations when it overruled petitioner's motion for a bill of particulars. The Board's excuse that Petitioner could have obtained the information from Stine is necessarily without merit since Stine denied the charge. Secondly, such an excuse could have no more validity than any prosecutor's refusal to reveal specifics of a vague charge on the contention that it is unnecessary because the accused knows all the unstated specifics. This of course presumes guilt before trial. Moreover Graham was a supervisor and not an "employee" under the Act; so he could not possibly have been anticipated as being one of the "employees" Stine was alleged to have interrogated. Since Stine as part of his duties talked to hundreds of employees, he would have no way of knowing that the other of the two alleged employees was Joseph Rutledge who worked five miles away from the Apple Street Warehouse, which was the only place mentioned in the Complaint.

The Board admits (B.Br. 12, note 5) its practice of refusing to identify prior to the hearing employees allegedly subjected to unfair labor practices, excusing the practice

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[1] The letter "A" before page numbers in parentheses following a factual statement refers to the pages in the Appendix in the Court of Appeals supporting the statement. "B.Br" before page numbers in parentheses following a statement refers to the pages in the Board's brief in this Court where the statement is found.

on the ground that the refusal is to protect the employees against reprisals. First of all in the present case such refusal could not have been on that ground because Graham had already been discharged, and Joseph Rutledge had voluntarily quit. Besides even in other cases such an excuse cannot justify the practice, anymore than a prosecutor could so justify concealing the identity of non-defendant alleged co-conspirators in a conspiracy case. The possibility of reprisal cannot deprive the accused of his right to know with what he is charged. Protection or relief from possible reprisal must be otherwise provided.

Finally the Board's brief says that Petitioner has not proved that the concealment prejudiced petitioner. Such prejudice is presumed as it is in any other case where the time, place and persons involved in an alleged offense are concealed from the charged party. One is not required to state how the preparation of his defense would have differed had he not been taken by surprise. The petitioner simply never had the opportunity to prepare any defense against the surprise.

In the light of the admitted Board practice, and its most unfair effect on petitioner in this case, this case is an ideal vehicle for this Court to put a stop to such practice.

QUESTION II.

The Board's brief at page 11 admits that the complaint did not allege the April discharge of the five drivers was for protected concerted activities unrelated to unionism in violation of Section 8(a)(1), and that the Board nevertheless so found, but attempts to justify such variance by claiming that the issue was tried. There is no basis for such a claim in the record. The pages of the record cited by the Board (R. 62-63, 55) do not bear out its claim at all, but merely confirm the "slowdown" claim of

petitioner. Nor did petitioner raise such issue in its brief to the Trial Examiner as now claimed by the Board. On the contrary the very employees themselves denied there was any concerted activity at all. Indeed the General Counsel's brief to the Trial Examiner (A 260), itself, also confined the discharge of the five drivers to an alleged violation of Section 8(a)(3), with no contention that any violation of Section 8(a)(1) was involved.

As shown at pages 14 to 16 of the petition, the variance deprived petitioner of a fair trial, and other Circuits have held such a variance violates due process. This important question and conflict in the Circuits surely deserve resolution by this Court.

QUESTION III.

(The ordered reinstatement of Supervisor Graham)

The Board claims this Court has already decided this question adversely to petitioner in *Local No. 207, Association of Bridge Workers* v. *Perko*, 373 U.S. 701, 707, in which this Court held that the National Labor Relations Act had preempted jurisdiction from state courts in a case where an employee, Perko, sued his union for damages for unlawfully causing his discharge.

In *Perko*, Perko was not in fact a supervisor under the Act while here it is agreed that Graham was a supervisor. However, this Court in *Perko* by way of dicta did discuss the hypothetical case "even if it be assumed that Perko was not an employee but was solely a supervisor." In that hypothetical discussion this Court noted by way of analogy that the Fifth Circuit in ordering supervisors reinstated with back pay had held in the two cases mentioned on page 17 of the petition here[2] that "discharge of a super-

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[2] *NLRB* v. *Better Monkey Grip Co.*, 243 F.2d 836 (1957) and *NLRB* v. *Talladega Cotton Factory*, 213 F.2d 209 (1954).

visor for failure effectively to coerce employees into renouncing their union affiliation constitutes a violation of Section 8 (a) (1), because such a discharge would reasonably cause non-supervisory employees to fear that they might meet the same fate if they adhered to the union."

In the case at bar, no such effect on non-supervisory employees was possible because they had no knowledge of Graham's alleged instructions to engage in surveillance. Nevertheless, in its decision after it found that Graham was discharged for refusing to carry out the alleged surveillance instructions, the Board went on to say "We find in the circumstances of this case, that this was unlawful without regard to employee knowledge" (Pet. App. 30). Hence the Board and Court below went far beyond the cited Fifth Circuit cases in ordering Graham's reinstatement with back pay.

In *Perko* this Court gave only a tangential consideration to the cited Fifth Circuit cases in making use of them by way of analogy. It has never given direct consideration to the issue of the very validity of those decisions, and the conflict between them and decisions of the Fourth and Ninth Circuits, in addition to the rationale and raison d'etre of the Taft-Hartley Amendments on the Board's right to order reinstatement of supervisors, or to the practical, ruinous consequences to any employer that could flow from such ordered reinstatement, all as discussed at pages 16 to 18 of the petition here. The case at bar again in this instance presents a perfect vehicle for this Court to end the confusion and clarify the proper interpretation to be given to Taft-Hartley on this issue.

QUESTION IV.

There is no evidentiary conflict on the issues raised by this question, nor has the Board's brief referred to any.

The question accepts the Board's findings as correct. There is no dispute that both supervisor Graham and Joe Rutledge (who was not even in the unit attempted to be organized, but was five miles away), to whom Vice President Stine is alleged to have given surveillance instructions, refused to carry out such instructions, and there is no evidence and no finding that such instructions were ever revealed to any employee. Hence the very important issues raised by petitioner's Question IV and the conflict created in the Circuits, as discussed at pages 18 to 20 of the petition here, are clearly made out by the record.

QUESTION V.

(Discussed at pages 20 and 21 of the Petition)

What the Board's brief calls an evidentiary dispute on this question is really not, but is a question of semantics. The actual conduct of the employees involved is not in dispute. The Board chose to call such conduct concerted activity protected by Section 8(a)(1), certainly a legal conclusion, rather than a "slowdown," a word which petitioner used to characterize the conduct. Petitioner does not wish to engage in a semantics dispute, and is satisfied to have this Court consider the conduct involved itself without any "trigger-word" characterization, and resolve the legal issue.

QUESTION VI.

This question likewise is not based on any evidentiary conflict. It raises an issue based on undisputed facts in the record. There was no evidence whatever, either circumstantial or direct, and the Board in its brief makes no claim to the contrary, that petitioner had any knowledge of union sympathy, activity or membership of any of the

discharged employees referred to in Question VI. Hence the issues raised by petitioner's Question VI, discussed at pages 21 to 23 of the petition here, are plainly supported by the record.

QUESTION VII.

This question does not involve any evidentiary dispute, but does involve a difference between the permissible legal conclusions by the Board and by petitioner to be drawn from the evidence. The question is whether the alleged statements in President Beerman's speech can be legally found to be an offer of reward in violation of Section 8 (a) (1), plainly a legal question. It has never been held that this Court is bound by legal conclusions of the Board or that they are not subject to review here. The importance of the issue raised and the conflict in the Circuits pointed out at pages 23 to 25 of the petition merit this Court's review.

CONCLUSION

The issues raised by the petition being supported by the record, for the reason stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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